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SUPREME COURT OF THE UNITED STATES
October Term 1972

No. _____

LOCALS 268 and 1130 of the
Brotherhood of Railroad Trainmen,
Petitioner,

v.

United States of America, Chesapeake
and Ohio Railway Company, Locals
362 and 1796 of the Brotherhood of
Railway and Steamship Clerks, Freight
Handlers, Express and Station Employees,
Respondents,

and

Locals 268 and 1130 of the Brotherhood
of Railway Trainmen,
Petitioners,

v.

United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT COURT OF
APPEALS

To The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Locals 268 and 1130 of the Brotherhood of Railroad Trainmen (now Locals 1307 and 1917 of the United Transportation Union) hereby petitions for a Writ of Certiorari to review the decision of the Fourth Circuit

Court of Appeals made on December 26, 1972.

OPINIONS BELOW

The Fourth Circuit Court of Appeals' decision decided on December 26, 1972, and the District Court's opinion decided on August 24, 1971, are appended hereto in the appendix. The opinion of the Fourth Circuit has not yet been officially reported. The District Court's opinion was not officially reported.

JURISDICTION

The judgment sought to be reviewed was made by the Fourth Circuit Court of Appeals on December 26, 1972. No petition for rehearing was filed nor was there any extension granted to file this Petition for Certiorari. The Fourth Circuit Court of Appeals stayed its mandate on January 12, 1973, for 30 days to permit petitioner to file its application for a writ of certiorari. The statutory provision believed to confer jurisdiction on the Court to review the judgment in question is 28 U. S. C., Sec. 1254 (1). The District Court has jurisdiction pursuant to the provisions of 42 U. S. C. 2000e-et seq. commonly known as Title VII of the Civil Rights Act.

QUESTIONS PRESENTED FOR REVIEW

1. Does Title VII of the Civil Rights Act permit the displacement of existing employees in granting remedial relief?

2. Can statistical evidence establish a

pattern or practice of intentional discrimination in hiring prior to 1964, and thereby justify the granting of remedial relief under Title VII of the Civil Rights Act?

3. Does the language in 42 U. S. C. 2000e-2(h) permitting an employer to maintain a bona fide seniority system cover seniority systems developed prior to July 2, 1965, and is Title VII of the Civil Rights Act to be applied retroactively?

4. Should seniority in a particular job that requires an individual to work in, prior to advancement to the next level job which is not an entry level job, be used as the determinative factor to ascertain a person's place on the roster at the next level job when he is bidding against a member of an excluded class for a future vacancy?

STATUTE INVOLVED

The Statute involved is the equal employment opportunity chapter of the Civil Rights Act found in 42 U. S. C. 2000e-et seq. The provisions of this chapter that are directly involved include:

42 U. S. C. 2000e-2

(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's

race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin. . .

(c) It shall be an unlawful employment practice for a labor organization

(1) to exclude or to expel from its membership, or otherwise discriminate against, any individual because of his race, color, religion, sex or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of section . . .

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment

pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C. 2000e-6

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an

application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

STATEMENT OF THE CASE

A. Statement of Material Proceedings

On October 17, 1968, the United States Government filed a complaint in the United States District Court--Newport News Division against the Chesapeake and Ohio Railway (hereinafter referred to as the C&O), Locals 268 and 1130 of the Brotherhood of Railroad Trainmen (the Brotherhood of Railroad Trainmen later became the United Transportation Union) (hereinafter referred to as Locals 268 and 1130), and Locals 362 and 1796 of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as Locals 362 and 1796), alleging violation of Title VII of the Civil Rights Act of 1964. All defendants alleged compliance with Title VII and specifically denied that any discrimination existed and stated that any differences that may have resulted arose out of a bona fide seniority system and as the result of different classifications of parties and different operating agreements and requirements.

The District Court after a lengthy hearing, found there was no discrimination in hiring and assignment since the passage of the Act and

further found that there was no discrimination in hiring and assignment prior to the passage of the Civil Rights Act. The District Court did provide some remedial relief (See opinion in App.). The Government noted its appeal. Locals 268 and 1130 appealed from the provision of the District Court's decree that provided if a Barney Yard man and a General Yard man pass the conductor's exam on the same day, their seniority on the yard conductor's roster would be determined by their company seniority. On appeal, the Fourth Circuit Court of Appeals found there was discrimination in pre-Act hiring and ordered broad remedial relief to overcome the present affects of past discrimination. The Court concluded that the pre-Act discrimination against black Barney Yard men had present affects and held that Barney Yard brakemen could use their company seniority to bid on vacancies in the General Yard, including those caused by furloughs. The Court also ruled that Barney Yard brakemen who passed the conductor's exam could bid for vacancies for yard conductor. In the event that bidding for a yard conductor's vacancy was between two Barney Yard men or a Barney Yard man and a Yard brakeman, the job would be awarded to the person with the longest company seniority, but if there were only Yard brakemen bidding, then the Yard brakeman with the longest seniority on the yard conductor's roster, and not company seniority would prevail. Finally, the Court of Appeals permitted inter-craft relief by permitting Barney Yard men and Group III Clerks employed before the Civil Rights Act to bid on vacancies in the General Yard and in

Group I and II Clerks based upon their company seniority.

The parties will be referred to as indicated and all page references will be made to the printed record used in the Court of Appeals, except where reference is made to the appendix in this Petition.

B. Hiring In The General Yard and Barney Yard

The suit by the Government in reference to Locals 268 and 1130 involved alleged discrimination by the locals and the C&O in the hiring and assignment of railroad employees at the Barney Yard and General Yard at the C&O's terminal in Newport News.

The evidence showed that the C&O last hired men in the General Yard and Barney Yard in 1957 (621, 637, 638). The C&O began hiring again in 1970,and there was never any finding by any Court that there was any post-Act discrimination in hiring and assignment. Prior to 1964, the date of the passage of the Civil Rights Act, the records did show that all Barney Yard men were black and all men in the General Yard were white (172, 824). Local 268 had jurisdiction over brakemen and yard conductors in the General Yard, while 1130 had jurisdiction over all men in the Barney Yard (982). Locals 268 and 1130 were organized by craft (983), and a person's assignment to a local depended upon his craft and not his race (994).

The uncontradicted evidence indicated that the men in the Barney Yard first worked for an

independent contractor until the C&O built Pier 9 in 1914 (210). At that time Barney Yard men were not getting paid as much as the men in the General Yard and formed the Barney Yard Committee to represent their interests (215). The United States Railroad Administration, a Government Agency, took over the C&O in 1917 and operated it until 1920 (189). While the Government was in control, the Barney Yard Committee successfully negotiated an agreement on June 1, 1918 providing that Barney Yard riders would be paid the same as yard brakemen (223), and that the seniority rights of the men in the Barney Yard and General Yard would be separate and distinct (223). The Barney Yard Committee continued to represent the men in the Barney Yard until 1959 when Local 1130 was chartered (123). The agreement negotiated between the C&O and the Brotherhood of Railroad Trainmen continued to reflect the practices of the earlier Government agreement and authorized the maintenance of separate and distinct rosters for the Barney Yard and General Yard.

Once the Barney Yard men were successful in negotiating separate and distinct rosters, they adopted a procedure of hiring. The Barney Yard Committee would always ask the most senior men if they wanted to recommend anyone (129). The recommended friend or relative would then be interviewed by the assistant superintendent of the coal piers and would be hired if there was a vacancy and if he met the qualifications (129, 130, 598). Several men testified in detail that they were hired as a result of a friend's recommendation (83, 264). A similar procedure

was followed in the General Yard except the trainmaster interviewed the applicants (598). All men hired in the Barney Yard worked initially as Barney Yard riders, and all men hired in the General Yard were hired as yard brakemen.

There was no evidence at any time showing any overt act of discrimination. Application for jobs at the C&O was standard with every applicant taking a physical examination and a police check (597). The application form was free of racial designation (C&O Exhibit 3).

C. Comparison of Make-Up And Wages Of Barney Yard and General Yard

Separate seniority rosters were maintained in the General Yard and the Barney Yard (240), and Barney Yard men could not bid for jobs in the General Yard, and General Yard men could not bid for jobs in the Barney Yard (233, 234).

Lines of progression were followed in both the Barney Yard and General Yard. A man employed in the Barney Yard first worked as a brakeman, and then could qualify for foreman or car retarder operator (97). Promotion from Barney Yard brakeman to foreman and car retarder operator was by seniority provided the man was qualified (93). Some of the men in the Barney Yard were not qualified for foreman because of lack of education (98) or knowledge (99). No tests were required for promotion. Only one seniority roster was maintained in the Barney Yard (122), and some men in the Barney Yard could work the job of brakeman, foreman

and car retarder operator in the same month (134).

In the General Yard a brakeman was eligible for promotion to yard conductor. Promotion to conductor required at least three years of experience in the Yard (808), and passage of a written test. Brakemen seeking promotion to yard conductor would have to be fully familiar with the operating rules, including both yard and road service (783, 784). Conductors were determined by need and every man on the conductor's roster had passed the conductor's exam (812). A yard brakeman's seniority on the conductor's roster was determined by the date he passed the exam except if two or more Yard brakemen passed the exam on the same day, then their seniority between them would be determined by their seniority on the Yard brakeman's roster.

There was no bidding for vacancies in the General Yard and Barney Yard. A vacancy was filled by the man who had the most seniority in the yard where the vacancy occurred (1594, 1595). A senior brakeman could displace anyone junior to him (1603). There were no job stabilization agreements and a furloughed man could not carry his seniority to other places of employment.

The brakemen in the Barney Yard were paid the same wages as Yard brakemen (87). Foremen in the Barney Yard were paid the same as conductors in the Yard (87). There was a conductor for each crew in the General Yard, and a foreman for each crew in the Barney

Yard (94, 95). The Barney Yard also employed at least three car retarder operators per shift who had no counterpart in the Yard and were paid more than anyone in the Yard (87, 91, 94, 95).

D. Comparison Of Work In Barney Yard and General Yard

The men employed in the Barney Yard were responsible for taking loaded coal cars to either Pier 14 or 15, where they were dumped and then returned to the empty yard (86, 87). No engines were used, as the cars moved by gravity (142). The loaded cars were started off by a "teaser" who initiated momentum through a jack-like device (88). The brakeman then rode the loaded car to the "mule pit" using the hand brake on the side of the car to control speed (86). The "mule" (a remote controlled power device), then took the car to the dumper where the coal was dumped (86). The coal was dumped mechanically with the empty car being kicked back to the empty yard by a machine called a "goat" (87).

The car retarder operator was responsible for kicking the cars and also automatically aligned the switches to make sure that the empties went into the appropriate return track (87). The Barney Yard foreman supervised the crew and made sure that the proper cars were taken to the mule pit (93, 795). The Barney Yard men worked in a confined area where a number of tracks converged to one on each pier (101).

The work in the Yard differed substantially from the work in the Barney Yard. The men in

the Barney Yard did not have to know signals (783), while the men in the Yard had to know signals for both the Yard and road service (783). The men in the Yard did not work in a particular area, but over a large area (167), covering four yards (170). The men in the Yard had to be familiar with the operating rules for both the Yard and road service, signalling, flagging, and the classification and order of trains (177, 178, 783, 784, 785). The brakemen in the General Yard also had to know how to read classification signals (789), derail targets and lights (789), time tables (789), speed limits, and understand the meaning of lights at crossings. General Yard men, in addition to knowing the operating rules and regulations, had to know and qualify on the motor rules, radio rules, and switching instructions (789, 794). Barney Yard men did not have to qualify under these rules (792). The men in the Barney Yard generally rode cars down an incline (794), while men in the Yard worked with engines at various yards, and engaged in classification, switching (making up and breaking down trains), transfer work (moving cars from one part of the yard to another), and industrial switching (71).

REASONS FOR GRANTING WRIT

No cases interpretating the provisions of Title VII of the Civil Rights Act have permitted the displacement of existing white employees by blacks in order to afford remedial relief. The Courts in the decisions of United States v. St. Louis, San Francisco Ry. Co. 464 F. 2d 301 (8th Cir. 1972), cert. denied January 8, 1973, and United States v. Jacksonville Terminal 451 F. 2d 418 (5th Cir. 1971) cert. denied 406 U.S. 906 (1972)

nd Local 189 v. United States 416 F. 2d 980 (5th ir. 1969) cert. denied 397 U. S. 919 (1970) only ermitted the excluded class to bid on vacancies s jobs became available and referred to new ob openings. It is settled that qualified Negroes ith greater seniority cannot displace incumbent orkers. See United States v. Hayes International orp. 456 F. 2d 112 (5th Cir. 1972). Here the ourt has ordered that Barney Yard brakemen em- loyed before the passage of the Civil Rights Act an use their company seniority to fill General ard vacancies, including those caused by furloughs.[1] talics Ours). At the C&O Terminal in Newport ews, regularly employed Yard brakemen are ften furloughed for short periods for various easons, including miner's vacations or strikes. Ralph Reighard, a Yard brakeman with a date f hire of March 20, 1947, was holding a regular rakeman's job and was furloughed, he could not et his job back if any one of approximately thrity- our Barney Yard men who have dates of hire or eniority greater than Reighard decided to take he job when the job became available again. (See &O Exhibits 10, 13, 29, 34). If a Barney Yard an took the vacancy caused by the furlough, here would then be a vacancy in the Barney Yard hich could only be filled by a junior Barney ard man. Reighard could not exercise his sen- rity for the vacancy created by the Barney ard man who left his job to take the job in the eneral Yard. Although Reighard could displace

[1] A furlough cannot cause a vacancy, but it s apparent that the Court meant that a vacancy ccurred when a job was recalled after a furlough.

any other regular brakeman with less seniority, the end result would be the displacement of one less General Yard man employed in the General Yard. The effect is that a white incumbent worker has been bumped out of his present position by a black who has greater seniority, and a senior white could remain out of a job (on furlough) while a junior black (in terms of company seniority) is recalled to work. See Local 189 v. U.S. supra at 988.

It is also to be noted that the Circuit Court of Appeals' finding of pre-Act discrimination here was based upon statistics not found to be rebutted. The Fifth Circuit Court of Appeals in United States v. Jacksonville Terminal supra at 441, remarked that statistics do not establish a prima facie case of discrimination. Locals 268 and 1130 submit that the language in Title VII of the Civil Rights Act requiring a pattern or practice of intentional discrimination is not met by showing statistics of pre-Act employment where the alleged excluded class successfully negotiated with the U.S. Government separate seniority and then perpetuated the separate seniority by adopting a procedure of hiring that insured their status. Those cases in other Circuits using statistics to establish discrimination have had ample supportive facts to negate any attempt to undermine the reasonableness of the statistics drawn. See United States v. Jacksonville Terminal Company supra. and United States v. St. Louis, San Francisco Ry. supra. where in addition to statistics there was either post-Act discrimination, written agreements precluding the hiring of black employees, or where there were overt acts of discrimination. See

Parham v. Southwestern Bell Telephone 433 F. 2d 421 (8th Cir. 1970), where in addition to statistics there was post-Act discrimination and the placement of blacks in lower paying, menial jobs. See Jones v. Lee Way Motor Freight 431 F. 2d 254 (10th Cir. 1970) where in addition to statistics the company overtly practiced post-Act discrimination. See Griggs v. Duke Power Company 420 F. 2d 1255 (4th Cir. 1970) reversed in part 401 U. S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1970) where the trial court found as a matter of fact, discrimination in hiring and assignment.

Locals 268 and 1130 also submit that the language of Title VII permitting an employer to maintain a bona fide seniority system notwithstanding any other provision of the Act (See 42 U. S. C. Sec. 2000e-2(h)), and the intent of Congress (See the remarks of Senators Clark and Case, 110 Congressional Record 6992) show that Title VII should have only a prospective application and since there was no post-Act discrimination, there was no need to reform the seniority system. Here the General Yard men and Barney Yard men acquired their present position and seniority rights at a time when it was not an unlawful employment practice to maintain separate and distinct seniority rosters. Here the Circuit Court, by reforming the seniority and no transfer provisions by allowing Barney Yard men and Group III Clerks to exercise their company seniority for all future vacancies, has retroactively applied the provisions of Title VII of the Civil Rights Act.

Finally, the Circuit Court has refused to allow a General Yard man to use his Yard seniority as a determinative factor when competing with a Barney Yard man for a position on the Yard conductor's roster. The position of yard conductor is not an entry level job. It is to be noted that the Eighth Circuit Court of Appeals refused to allow train porters (the excluded class) to use their full company seniority in bidding on future vacancies in freight braking jobs. See United States v. St. Louis San Francisco Railway Company supra. The uncontradicted evidence showed that the skills and experience gained by the men in the Barney Yard at any level cannot be equated with the skills and experience gained in the General Yard because of the functional and classification differences in the two yards, and the day-to-day experience gained from working in the General Yard. The Court in allowing Barney Yard men with no experience in the General Yard to use their company seniority to determine a Barney Yard brakeman's position on the yard conductor's roster is in effect giving Barney Yard men super-seniority in violation of Title VII of the Civil Rights Act.

CONCLUSION

For the reasons heretofore stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted

Raymond H. Strople

CERTIFICATE OF SERVICE

I hereby certify that three printed copies of
e Petition for a Writ of Certiorari in the case of
cals 268 and 1130 of the Brotherhood of Rail-
ad Trainmen v. United States of America, et
, were deposited in the United States mails,
st class, to the Solicitor General, Department
Justice, Washington, D. C. 20530; to
chard S. Weil, Attorney, Department of Justice,
shington, D. C. 20520, counsel of record
United States of America; to Joseph B. Geyer,
North Charles Street, Baltimore, Maryland 21201,
unsel of record for the C&O; and to James L.
ghsaw, Jr., Suite 506, 1015 Eighteenth Street,
W., Washington, D. C. 20036, counsel of
cord for Locals 362 and 1796, on the 24th
of January, 1973. It is further stated that
e Petition has been served on all parties.

Raymond H. Strople

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. CIVIL ACTION NO. 1469-NN

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, et al.,

Defendants.

(Judgment Entered August 24, 1971)

MEMORANDUM OPINION

Averring violations of Section 707 of Title VII of the Civil Rights Act of 1964 (42 U. S. C. A. § 2000e-6), and of Executive Order No. 11246 (and its predecessor No. 10925), the United States, as plaintiff, here proceeds against the Chesapeake and Ohio Railway Company, and four Union Locals. In brief, it is alleged that the Railroad is engaged in acts and practices that discriminate against its Negro employees in their enjoyment of equal employment opportunities and that the Union Locals are in complicity with these alleged violations. Organizational segregation is likewise laid to the unions.

Parties

Specifically, the defendants are:

Chesapeake and Ohio Railway Company (hereinafter referred to as "C&O"), which operates a railway terminal at Newport News, Virginia, in connection with its business of the interstate transportation of coal and general merchandise. It is also agreed that C&O hauls mail and commodities under contract with the United States.

Local Lodge 268, Brotherhood of Railway Trainmen (hereinafter referred to as "BRT 268"), to which belong the brakemen and conductors employed by C&O in the General Classification Yard in the terminal at Newport News.

Local Lodge 1130, Brotherhood of Railroad Trainmen (hereinafter referred to as "BRT 1130"), to which belong the brakemen, foremen and car retarder operators employed by C&O, exclusively in the coal handling facility at the Newport News terminal known as the Barney Yard.

Local Lodge 362, Brotherhood of Railway Airline and Steamship Clerks (hereinafter referred to as "BRAC 362"), to which belong Group 1 and Group 2, Clerks, employees of C&O in the terminal at Newport News.

Local Lodge 1796, Brotherhood of Railway, Airline and Steamship Clerks (hereinafter referred to as "BRAC 1796"), to which belong Group 1, Group 2 and Group 3, Clerks, employees of C&O in the terminal at Newport News.

Contentions

The plaintiff contends that prior to the effective date of the Civil Rights Act of 1964, July 2, 1965, and thereafter, the C&O, on the basis of race, assigned white employees, as brakemen, to the General Classification Yard, and Negro employees, as brakemen, to the Barney Yard; that the duties in the two Yard categories are similar and require the same qualifications, skills and training. The wages are the same.

Further, it is charged that brakemen in the General Classification Yard may seek promotion to Yard Conductor, Yardmaster, and General Yardmaster. Barney Yard brakemen may rise

only to positions of Foreman and Car Retarder Operators in the Barney Yard. Seniority, fixed by date of employment, is not transferrable from one yard to the other. Thus, according to the Government, the Negro brakeman in the Barney Yard is "locked in" to a less desirable job ladder with no chance for promotion to Yard Conductor, Yardmaster, etc.

Discrimination by race in employment in the General Classification Yard and Barney Yard is reflected, charges the Government, in the two segregated BRT locals to which such employees belong. General Classification Yard Brakemen and Conductors are members of BRT 268 whose membership of 176 was entirely white on January 1, 1970. Barney Yard Brakemen, Foremen and Car Retarder Operators belong to BRT 1130 whose roster of 85 active members on January 1, 1970, was all black. Such organizational segregation, the Government charges, is a violation of Title VII.

In the C&O clerical force at its Newport News Terminal, the Government contends that white employees only are assigned to Group 1 and Group 2, Clerks' Transportation, positions, and blacks mainly to Group 3, Transportation, jobs without equal accesses to Group 1 and 2 jobs. In addition, white clerks all belong to BRAC 362, the roster of which numbers 243. Group 1, 2 and 3 employees, who are black, belong to BRAC 1796, the roster of which numbers 182. This segregation is charged to be a violation of Title VII.

Further, the Government contends that an "Employment Qualification Form B" test which the C&O instituted for promotion beginning in January, 1966, does not predict job performance, disqualifies a greater percentage of blacks than whites, is violative of the Civil Rights Act, and, as an aside, is also contrary to specific provisions of the collective bargaining agreements between the C&O and BRT and BRAC.

* *

The C&O responds to the charge of racial bias by showing the background and history of its hiring practices. What is now its Barney Yard Operation for exporting coal, until 1914 was handled by a labor force of an independent contractor. Upon the construction of Coal Pier 9 in 1914, C&O took over the entire coal loading process as a company operation, including as its own employees, the Negro laborers then on the job. These Negroes, seeking to improve their work standards and wages, on June 1, 1918, formed a "Barney Yard Committee" which negotiated with C&O (1) that Barney Yard car riders would be thereafter paid at the same rate as the General Classification Yard brakemen and (2) that seniority rights of Barney Yard men and General Yard men would be separate and distinct. This agreement of June 1, 1918, made while the United States Government was operating the C&O, remained in effect until April 1, 1959. After April 1, 1959, Barney Yard brakemen petitioned for and became members of a local lodge of BRT, which thereafter negotiated the collective bargaining agreement for the Group and which agreement retains the separate seniority roster.

The C&O therefore contends that through April 1, 1959, the Barney Yard men operated under the Barney Yard Agreement which they negotiated for and pertains to its own craft and skill. Thereafter, Barney Yard brakemen were included in BRT collective bargaining agreements which make no reference to and do not discriminate with regard to race.

The C&O contends, moreover, that the work in the General Classification Yard and the Barney Yard is not similar. A Barney Yard brakeman, says C&O, is a car rider who releases brakes and applies brakes on a loaded coal car moving by gravity down a slight grade from the storage "hump" to the coal dumping area. No knowledge of signals, rules, train layouts, exchanges, routings, etc. are required. The Railroad's evidence is that General Classification Yard brakemen are involved in a far more sophisticated operation in moving cars using locomotives, making up trains, giving hand signals, etc.

C&O urges with emphasis, relying upon Section 703(h) of the Civil Rights Act, 42 U. S. C. A. §200e-2(h), that such minor existing preferences, distinctions and differences as may exist between its employees (whatever their race) are derivatives of a bona fide seniority system established under lawful collective bargaining agreements mandated by the Railway Labor Act through National Mediation Board Orders.

* *

As to Groups 1, 2 and 3 Clerks, the C&O maintains that the craft and groupings were established in 1918, and are not designed, intended

or effective as racially discriminatory. Since 1918 clerks have fallen into three groups.

Pier laborers were not a part of any craft until a National Mediation Board Order in 1936 certified as a "clerical class," to be included in Group 3, the laborers at stations and the merchandise piers at Newport News. Thus, says C&O, the classification of laborers as "Group 3 Clerks," was directed by the Government's own National Mediation Board under the Railway Labor Act. These employees are eligible for promotion to Group 1 and 2, some have so progressed, but generally have difficulty qualifying.

The "EQ Form B" test to which plaintiff objects, is, according to the C&O, a test culminating from ten years of study at C&O, devised and validated by professional industrial psychologists. Its object is non-discriminatory, but instead is a planned part of a new progressive approach by C&O towards upgrading its hiring practices.

Finally, says C&O, it has taken every affirmative action possible, beginning before 1964, towards compliance with the Civil Rights Act, including active recruitment, within its labor force, and without, to secure qualified Negro employees in all areas of work.

* *

BRAC Locals 362 and 1796 maintain that they are not segregated on basis of race; that blacks and whites may belong to either lodge; that as locals they do not negotiate collective bargaining agreements with the C&O, but that

such bargaining is done by BRAC system wide and nationwide as authorized by the National Mediation Board.

Members of Locals 362 and 1796 are governed in this employment with C&O by agreements between BRAC and C&O as to rates of pay, rules, working conditions, and the designation of craft or class as determined by the National Mediation Board under Section 2 of the Railway Labor Act (45 U. S. C. §152).

BRAC contends further that the job classifications in Groups 1, 2 and 3 Clerks, originated at a time (1918) when the United States Government was administering the railroads, and were based upon work performed and not race. Work performed is still the test, says BRAC, and not race. The division of employees on the C&O into separate crafts and classes was made pursuant to the Railway Labor Act and the negotiation of collective bargaining agreements for each such craft or class is required by the Railway Labor Act.

Specifically, Locals 362 and 1796 point out that neither of its locals operates a hiring hall or job referral service and neither participates in any way in the hiring of any employee by the C&O or in the initial assignment of a newly hired employee to a job. Neither of these Locals maintains any seniority list.

* *

Locals 268 and 1130 BRT contend that the nature of the work performed by the members

of the two locals is not similar; that the locals are not separated on the basis of race; that the two locals are mutually beneficial and members are not deprived of employment opportunities.

They further contend that the Newport News Locals do not represent the members in collective bargaining negotiations with the C&O; do not maintain any seniority lists; do not hire or fire or assign positions; and do not operate any hiring hall or referral system.

BRT Locals have a large degree of local autonomy in their social aspects and have chosen to remain apart--a decision made by vote of each lodge.

FINDINGS OF FACT

(1) The C&O is in interstate railroad employing 24,195 persons. A part of its operation is a terminal at Newport News, Virginia. The terminal encompasses (a) a General Glassification Yard through which passes all freight in any category, coal included, and (b) a special yard, termed the "Barney Yard", which rehandles only coal for export by sea. At the waterside of the terminal are merchandise piers for import and export purposes of general cargo, and special coal piers whose sole purpose is the export of vast tonnages of coal.

(2) The C&O employment at the Newport News Terminal reflects the decline in railroad employment nationwide and totals now 1000 persons, down from 1600 in better years. Hiring is decentralized and is the responsibility of the

affected department. The employees at the Terminal are union members and belong to and are represented by local lodges of labor organizations which are designated and authorized by the National Mediation Board, a federal agency, pursuant to the Railway Labor Act (45 U. S. C. A. §152, Ninth) originally passed by Congress in 1926. That Railway Labor Act (45 U. S. C. A. §152, Fourth) and its predecessor General Order 27 also is responsible for the division of the C&O employees (and all railroad employees, everywhere) into crafts and classes for the purpose of such union representation, much of which was set up in 1918.

(3) While the National Mediation Board has designated some 17 unions to represent different crafts and classes of C&O employees, for the purposes of this suit, the court is only concerned with two, namely: The Brotherhood of Railroad Trainmen (BRT),* and the Brotherhood of Railway and Airline Clerks, Freight Handlers, Express and Station Employees (BRAC). The certification of these unions by the National Mediation Board for employee representation is system wide and covers the craft or class wherever located on the C&O.

(4) Among the employees of C&O are a substantial number of clerical, office, station and stores employees. As a craft or class, they are represented by BRAC which has negotiated for them a collective bargaining agreement with C&O. This system wide agreement covers the employees of the clerical craft, as enlarged by law to include terminal laborers, at Newport

*Redesignated now as United Transportation Union

News Terminal.

(5) Among the employees of C&O are a substantial number of operating railroad personnel, such as engineermen, firemen, brakemen, and trainmen. The scope of the crafts or classes of such employees is likewise determined by the National Mediation Board under authority of the Railway Labor Act. On a system wide basis, The Brotherhood of Railway Trainmen represents all operating employees. The General Classification Yard brakemen and Barney Yard brakemen of concern in this suit constitute two different crafts within the BRT. At Newport News, these brakemen are members of two locals of BRT, namely, Local 268 and Local 1130.

(6) As earlier stated, the complaint here filed by the United States on October 17, 1968, proceeds against the C&O, both BRT locals and both BRAC locals, charging (a) racial discrimination in hiring practices and segregated unions in violation of Title VII of the Civil Rights Act of 1964 (42 U. S. C. A. §2000e, et seq.) and (b) interference, through acts of discrimination, with the performance of government contracts, in violation of Presidential Order 11246.

Counsel for the United States has agreed that it was not seeking greater remedial relief against C&O under the Executive Order than the relief it sought under Title VII. **

We conclude that the obligations under the Executive Order are encompassed in the more specific commands of Congress within the terms

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** Hearing November 4, 1969, Tr., p. 14.

of Title VII of the Civil Rights Act. The suit has proceeded on this theory, and the conclusions herein are considered by this court as applicable to both claims.

(7) At the outset, the court finds, from an examination of the complaint and the answers by the Government to interrogatories, that the discrimination which triggers this proceeding is limited to blacks employed only in the crafts whose locals were named as defendants, Group 1, 2 and 3 Clerks, Transportation, Barney Yard brakemen and General Classification Yard brakemen. The union locals which constitute the only defendants other than the C&O are the locals affecting only these classes and crafts of employees.

An effort to enlarge the suit by adding 15 additional labor organizations and locals as parties was instituted after the suit had already proceeded through sixteen months of laborious discovery. The motion to enlarge came on only three months before the final pre-trial conference and trial, which dates had been long established on the calendar. That motion to enlarge by adding parties was denied.

The court finds as a fact that the inter-craft ramifications of the Government's final argument and proposals which would cut across all craft lines at the Newport News Terminal, involving many unions, did not surface as a part of the relief sought by the Government until July, 1970, a scant sixty days before trial began, and nearly two years after the complaint was filed. In the intervening twenty-two months, it was the Government's position that it sought only intra-craft

relief involving Negroes in Group 1, 2 and 3 Clerks, Transportation Department, and inter-craft relief as to Negro Barney Yardmen in the General Clissification Yard service. Accordingly, no other inter-craft relief will be considered. Relief across craft lines, otherwise requested by the Government is not appropriate, was not timely requested, and the necessary and indispensible parties for such relief are not now before this court.

(8) Having reviewed and made the foregoing findings reflecting the division of the C&O employees into crafts and classes, their union representation and the general collective bargaining procedure, we proceed to other parts of this case.

(a) BRT, representing both General Classification Yard brakemen and Barney Yard brakemen, maintain two locals at Newport News to which such C&O employees may belong. BRT Local 268 is comprised of 193 members and on January 4, 1970 all were white. BRT 1130 is comprised of 164 members and on January 1, 1970 all were black. Such organizational segregation is suspect as violative of the Civil Rights Act. Certain changes will be solicited.

(b) BRAC, representing Groups 1, 2 and 3 clerks of C&O, maintains two locals at Newport News to which such employees may belong. BRAC Local 362 is comprised of 305 members, all Group 1 and 2 clerks, and as of January 1, 1970, 301 were white and 4 were black. BRAC Local 1796 is comprised of 162 members of Group 1, 2, and 3 Clerks, Transportation Department, and as of January 1, 1970, 158 were black and 4 were white. Such organizational segregation is suspect as violative of the Civil

Rights Act and certain changes will be solicited.

(9) Examining initially the C&O's hiring practices with regard to brakemen in the General Classification Yard and the Barney Yard, the court finds as a fact that for eight years prior to the effective date of Title VII of the Civil Rights Act, until January 1, 1970, i. e., for thirteen years, from 1957 until 1970, no new employees were hired in either yard. Therefore, any past pattern or practice of prior discrimination in yard hiring chargeable to C&O at the time this suit was filed in October, 1968, must have occurred prior to 1957. Of course, hirings in the General Classification Yard and Barney Yard are also subject to the court's scrutiny for the nine months period from January 1, 1970, when employment was reactivated, until September 21, 1970, the date trial began.

As to the latter nine month period, since January 1, 1970, 43 persons have been approved for work in the Barney Yard. 23 are now so employed. Of these, 13 are black, 10 are white. No evidence of discrimination based upon race has been shown.

Since January 1, 1970, 89 persons have been approved for work in the General Classification Yard. 42 are now so employed. Of these, 32 are white, 15-20 are black. (Exact breakdown by race is unknown.)

The evidence does not preponderate to show discrimination based on race in the hiring of brakemen since at least 1957 to the present.

(10) For many years (to 1936) laborers were hired for work on the piers through a daily "shape-up" procedure, i.e., laborers seeking daily hire would report to the pier area and as many as were necessary for the day's activities would be hired on the spot. Following the National Mediation Board action (in 1936) classifying pier laborers as "Group 3 Clerks" the status of such laborers has been much, much more secure under wage agreements, seniority rights, etc. As to C&O hiring practice, in Group 1, 2 and 3 Clerks generally, it appears from the evidence that 15 new permanent employees have been hired since the advent of Title VII of the Civil Rights Act. All 15 have been placed in Group 1, which is the highest skill classification and so designated by the Railway Labor Act. Three of these employees are stenographers. There was ample testimony, statistical and from the Negro Chairman of BRAC Local 1796, that Negroes with sufficient background and skill to qualify them for Group 1 jobs were simply unavailable. Efforts were made by the Union and the C&O to seek such employees from the minority group. The court finds this to be a fact. Of the 15 employees placed in Group 1, 13 were white, 2 were black.

During the period 1962 through 1969, 25 extra employees have been hired, which have Group 1, 2 and 3 employment rights. 14 are Negroes.

No Group 3 hirings have occurred at the Newport News Terminal since 1964.

(11) The court concludes from the facts found in (¶10) that it has not been proved by a preponderance of the evidence that the C&O has been

guilty of discrimination based on race in the hiring of Group 1, 2 and 3 Clerks, Transportation, since, at least, 1964 to the present.

Evidence has been offered that prior to 1964, absent a specific job application in mind, an applicant for general employment would be guided to the merchandise pier where there was a turnover in the labor force. This location held out the greater likelihood of success for the job applicant. Such referrals, however, in our judgment do not prove by a preponderance of the evidence that C&O had embarked on a racially discriminating course, forbidding employment to Negroes in Groups 1 and 2 Clerks. Nor do isolated general statements by witnesses that they did not apply for Group 1 or 2 work because they thought blacks would not be so hired, or that some person had told them that a black would not be so hired, prove discrimination.

So also, the fact that few Group 3 Clerks, Transportation, have progressed to Groups 1 and 2, is not of itself, evidence of racial discrimination. As elsewhere commented upon, Group 3 Clerks, Transportation, were essentially pier laborers and have not measured up to the more exacting qualifications and skills required of office work.

(12) While we find no fatal discriminatory racial overtures in original hiring, we do find three elements of the bidding and transfer practice in Group 1, 2 and 3 Clerks, Transportation Department, which lend themselves to invidious discrimination. The evidence indicated that seniority rules do grant rights to a Group 3 Clerk, Transportation, to bid on Group 1 and 2 jobs in the Transportation Department, but (a) subject to the rights of holders of

Group 1 seniority in Newport News in other departments and (b) subject to preference to Group 2 and 3 employees in transportation and other departments having seniority prior to January 31, 1943, and (c) extra employees with employment dates prior to January 31, 1943. Certain changes respecting the progression restriction to Group 3 Clerks, Transportation, will be solicited.

(13) As to C&O hiring practices in the crafts of General Classification Yard brakemen and Barney Yard brakemen prior to 1957, the court finds as a fact that the crafts are not similar and represent an entirely different trade. The only similarity, and there it ends, is that both General Classification Yard brakemen and Barney Yard brakemen ride cars, and set and release hand brakes. In fact, Barney Yard men were known, until a short time ago, as "car riders". Undoubtedly, the move to upgrade the nomenclature and classify such "car riders" as "brakemen" has precipitated some of the difficulty here.

A General Classification Yard brakeman moves drafts of cars under the motive power of a locomotive, a power he controls with signals. It is a force which can move in both directions into and out of a complex of industrial trackage, yards, and stations. He must concern himself with the dangers which exist in front, to the rear, and on adjoining tracks, dangers which move both ways. He must know signals for daytime, by hand, and for night, by lantern. The rules by which he works, and which he must know, are complicated, involving crossings, switchings, inter-line transfers, etc. Braking, as such, is actually a minor part of his job.

On the other hand, a Barney Yard brakeman is concerned only with the slight force of gravity as the single car, or small cut of cars he controls, moves downgrade at a slow speed. A minor knowledge of signalling is all that is necessary, if any. Movement is in only one direction and mostly in brightly lighted yards. Few, if any, rules concern him.

(14) The C&O practice of hiring blacks as Barney Yard brakemen prior to 1957 is understandable. Only blacks applied for such employment. As a matter of fact, only blacks applied who, through family connections, knew of openings in the existing Barney Yard labor force. There was a considerable pride by blacks in railroad employment. The pay was equal to whites--and much, much better than the existing wage scale elsewhere.

We do not find invidious discrimination in C&O hiring practices at the Barney Yard when only blacks applied for employment. No substantial evidence has indicated any designed C&O employment practice that black applications for employment prior to 1957 were turned from other railroad employment and steered by the C&O to the Barney Yard. Only blacks applied at the Barney Yard, and only blacks were hired.

Employment of General Classification Yard brakemen, likewise has proceeded on the basis of hiring when a job opened. There is no evidence before the court that the C&O failed to hire, as a company practice or procedure, any black applicant at the General Classification Yard because of race. To assume such would be

rank speculation without any constructive basis. No blacks applied and none were hired.

We do find, however, that to a degree there is a discrimination in the avenues for promotion in the Barney Yard. The system does "lock in" such employees.

Certain procedures to allow Barney Yard brakemen to seek status as yard conductors, assistant yardmaster and yardmaster will be therefore solicited to eliminate the present non-accessibility of these last mentioned jobs to Barney Yard employees.

(15) The court, after viewing all of the exhibits and testing them against two weeks of testimony, specifically finds that the seniority system on the C&O is a bona fide seniority system, in fact, in truth, and within the meaning of Section 703(h) of the Civil Rights Act of 1964. The changes required elsewhere in this Memorandum Opinion will serve only to eliminate certain abrasive features thereof as they apply at the Newport News Terminal.

The seniority system in the C&O, and for that matter on every railroad in the United States, had its national origin in General Order 27 promulgated by the Government's Director General of Railroads in 1918. In the choice of the segments for groupings (clerks, trainmen, etc.) and the separate rosters established, little basic changes have occurred even until now. There are 50 such seniority rosters in C&O employment at the Newport News Terminal alone. There are nine

separate clerical rosters, divided into Groups 1, 2 and 3. New employees establish seniority on one of these rosters in accord with collective bargaining agreements in the employee's craft. These agreements are negotiated system wide--not just for a single area of the railroad, such as Newport News Terminal. After establishing that seniority, an employee, system wide (and nation-wide as to railroads generally) does not take that initial seniority date from one roster to another. The individual's "seniority" and its importance to him in insuring his job security presupposes and depends upon jurisdictional boundaries. Such boundaries in the railroad industry are always craft boundaries. For an individual, black or white, to have as his seniority date his date of original employment as such to be made applicable to all crafts would be to offer no job protection whatsoever except on a vertical basis on a role of 24,000 employees--which would result in havoc.

One hard fact upon which every witness in this case agreed, no matter what his reason for appearance, and no matter where his interest lay, was that his seniority rights were the most important asset he owned "next to God and his family." A C&O employee hired today makes exactly the same salary as all other C&O employees now doing similar work, no matter when they were hired--5, 10, 15 years ago. But the senior employee has his "seniority date" which gives him preference as to lay-offs, rehiring, shifts--in other words, gives him job security.

Such seniority rosters are maintained without regard to race, and allegations by the Government that such separate rosters were kept on a racial

basis were without proof.

* *

CONCLUSIONS OF LAW

(1) The maintenance of separate BRAC Locals 362 and 1796 encompassing clerical employees, but one with black membership and one with white membership is a discrimination, invidious in its effect upon C&O employees. Such separate memberships are not a responsibility of C&O.

Parties will submit a plan within thirty (30) days from the date of this Memorandum Opinion, providing for the merger of these two locals, which plan will insure black representation for a period of five (5) years in such tender areas as grievance committees and other representation at the National convention of the United Transportation Union.

(2) The maintenance of separate BRT Locals 268 and 1130 encompassing two crafts in the brakemen area, but one with black membership and another with white membership, is a discrimination, invidious in its effect upon the employees. Such separate membership locals are not a responsibility of C&O which does not assign employees to unions.

Parties will submit a plan within thirty (30) days from the date of this Memorandum Opinion providing for the merger of these two locals, which plan will insure black representation for a period of five (5) years in such tender areas as grievance committees and other representation functions of the locals. The plan shall explore,

for a like period of five (5) years, some form of black representation at the national assembling of the United Transportation Union.

(3) The "EQ Form B" testing program which was initiated by C&O, we find to have been an affirmative effort by the railroad to upgrade employment policy, and not based in any effort to racially discriminate. The use of testing or measuring procedure can be useful and is not precluded ipso facto by the Civil Rights Act.

> "What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance." Griggs v. Duke Power Company, 401 U.S. 424 (1971).

But, on such basis, the "EQ Form B" tests employed by the C&O have not been shown to be a measure of job performance, and as presently constituted and administered, shall be discontinued.

(4) Having stated elsewhere that restrictions on the bidding rights of Group 3, Clerks, Transportation, to jobs in Groups 1 and 2, Clerks, Transportation Department, are a violation of the Civil Rights Act, the parties will submit a plan within thirty (30) days from the date of the entry of this Memorandum Opinion, under which the bidding rights of Group 3, Clerks, Transportation, shall be secured to Group 1 and 2, Clerks, Transportation, jobs at Newport News. To be eliminated are the prior bidding rights given to others other than Group 3, Clerks, Transportation,

to bid on Group 1 and 2, Clerks, Transportation jobs.

(5) This court recognizes, and has so found as a matter of fact, that the work performed by General Classification Yard brakemen and Barney Yard brakemen is totally dissimilar but that a common bond in the term "brakemen" is applied in both categories.

While no discrimination is found by the court to be chargeable to the C&O in connection with the hiring practices and procedures in these two crafts, nevertheless, the existence of the two rosters will continue to create friction. The orderly elimination of this abrasive situation would be to the best interest of all concerned, securing, however, their present seniority to all employees now serving in the two yards. Just as original entry brakemen can be trained to their jobs and their progression thereafter in the General Classification Yard, so also should Barney Yard brakemen have access to such training and progression.

Parties therefore will present to the court within thirty (30) days from the date of this Memorandum Opinion a plan to "top and bottom" the existing seniority rosters of the General Classification Yard and the Barney Yard to become effective January 1, 1972, with new hirings on and after that date to be upon a single roster serving both yards.

It is recognized that greater capabilities and skills than are now required may be necessary

at the original entry level of employment and such plans as presented may want to probe this problem.

Yard conductors, assistant trainmasters, and trainmasters, are recruited by the C&O exclusively from qualified brakemen in the General Classification Yard. Barney Yard brakemen, conceding that their training and work experience does not presently qualify them for such promotions are thereby effectively denied this avenue to move ahead. To this extent it does appear that they are "locked in" to the three grades of brakemen, foremen, and car retarder operators. Adding this detraction to the racial make-up of the two yard crafts, while not found to be a literal discrimination by this court, nevertheless is a further point of chafing which ought to be eliminated. Bearing in mind that the qualifications for yard conductor, assistant trainmaster and trainmaster should not, in any wise be lowered, the parties are directed to present to the court within thirty (30) days from the date of this Memorandum Opinion a plan to become effective January 1, 1972, under which enterprising Barney Yard brakemen seeking to upgrade themselves and seek promotion to yard conductors, assistant trainmasters, and trainmasters, may qualify for selection to those job levels through an appropriate C&O administered on-the-job training program.

We find our decision entirely consonant with Quarles v. Philip Morris, Incorporated 279 F. Supp. 505 (D. C. E. D. Va. 1968) and with Local 189, United Papermakers and Paperworkers v. United States, 416 F. 2d 980 (5th Cir. 1969). Indeed, with the

relief which we have ordered, much similarity in final result can be seen.

In Quarles, Judge Butzner began (IV, Page 510) with a departmental structure which he found ". . . was organized on a racially segregated basis." Quarles, then found the division into department to be an original discrimination.

Here, the system wide division into railroad crafts, at Government order beginning in 1918, we find carries no such stigma of being an originally discriminatory device, though corrections in certain phases thereof to insure against discriminatory practices must be made.

Our review of "Legislative History of Titles VII and XI of the Civil Rights Act of 1964", as published by the United States Equal Opportunity Commission, all 700 pages of it, do give us pause, however, with Judge Butzner's appraisal of that legislative history and its influence on the meaning of Section 703(h). We believe the Congressional debates cover the railway seniority system as an intended benefactor of that section.

In short, we specifically find from our review of the evidence, the exhibits, and the record in Congress, that the employment practices of the C&O founded in system wide collective bargaining agreements which may apply different terms, conditions, or privileges of employment in some few instances, are pursuant to a bona fide seniority system, as contemplated under 703(h).

As stated succinctly by Senator Clark of Pennsylvania, the chief proponent of the Civil Rights Act of 1964:

"First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a

result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would be set aside by the taking effect of title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title." (Emphasis added.) (BNA Leg. Hist., p. 3244 --footnote omitted).

In Local 189, United Papermakers, supra, it was agreed that the company overtly segregated the progression for promotion into two lines--one white, one black. The same union had jurisdictional control over all, but, again, with one white local and one black local. These lines of progression though dented by merger after passage of the Civil Rights Act of 1964, nevertheless, thereafter perpetuated the admittedly original discriminatory system.

This case is retained upon the docket. The requirements of the Memorandum Opinion shall be presented in writing on or before October 1, 1971 (extending the thirty (30) day period slightly in view of the Labor Day holiday).

Upon receipt of the plans to complement this Memorandum, an appropriate order will be entered.

John A. MacKenzie
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CIVIL ACTION NO.
1469-NN

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY, et al.,

Defendants

(Judgment Entered December 8, 1971)

DECREE

Pursuant to the Findings of Fact and Conclusions of Law entered in this case, it is hereby ORDERED, ADJUDGED AND DECREED for the Company's operation at Newport News, Virginia, as follows:

I

A. Defendants Locals 268 and 1130 (through the General Chairman of the United Transportation Union General Committee of Adjustment) and the Company shall negotiate an Implementing Agreement merging the Yard Brakemen's roster and the Barney Yard Brakemen's roster on a "top and bottom" basis. The General Chairman, and the Company, shall submit the Implementing Agreement to the court no later than ninety (90) days from the date of this Decree and shall be submitted to the plaintiff at least twenty (20) days before it is submitted to the Court. If an agreement is not reached within that time, all unresolved issues will be referred to the Court for decision. The Implementing Agreement shall become effective when approved by the court but no earlier than March 1, 1972, provided, however, that plaintiff shall have an opportunity to present to the Court its objections to the Agreement, if any, before the Agreement is approved by the court. It shall remain in effect until changed in accordance with the Railway Labor Act, provided that any proposal to change this Agreement shall be furnished to the plaintiff at least thirty (30) days before such change

becomes effective.

B. In instances where deemed necessary by it, the Company may require Barney Yard brakemen to qualify in the Yard and Yard brakemen to qualify in the Barney Yard, provided the employee has made such a request. The Company shall pay employees the straight time rate for each breaking-in period, not to exceed two (2) days.

C. 1. The Company shall advise all present Yard brakemen and Barney Yard brakemen, in writing, that they may receive training for the position of Yard conductor and if they qualify, will be promoted to the position in accordance with the terms of this decree. Barney Yard brakemen who desire such a promotion must so indicate to the Company in writing within 180 days of this decree. The Company shall provide each Barney Yard brakeman with an appropriate form for making the selection. The written notice given to each present Barney Yard brakeman shall state: (1) the pay rate of Yard conductor; (2) the standard test qualifications for promotion to Yard conductor; and (3) a summary description of the training to be given. The Company shall encourage present Barney Yard brakemen to qualify for promotion to Yard conductor. Any Barney Yard brakeman or Yard brakeman who elects not to avail himself of special promotion opportunities to Yard conductor provided in this decree shall retain his right to such promotion in accordance with the Yardmen's agreement.

2. The Company shall offer the training class to ten (10) Barney Yard brakemen to be selected in seniority order.

3. The Company shall pay such Barney Yard brakemen at the brakeman's daily pay rate during the time actually spent in training under the supervision of the Company instructors, but not to exceed 80 straight time hours or 10 days' pay at the straight time rate, unless the collective bargaining agreement provides otherwise. Such Barney Yard brakeman shall remain eligible to take the conductor's examination until he has failed it on three separate occasions. The Company shall offer the examination to present Barney Yard brakemen who make request in writing to take it, but the Company shall not require such employee to take the examination before one year and a half after he has begun training or one year after his last attempt to pass the examination.

4. Present Yard brakemen who are eligible for promotion to Yard conductor may take the conductor's examination at the same time that examination classes are held for Barney Yard brakemen. Such candidates may, at their convenience and at no expense to the Company, attend special classes which are held for Barney Yard brakemen.

D. Barney Yard brakemen shall be promoted to the Yard conductors roster after all of the following requirements have been satisfied: (1) they have worked for at least two years in the Barney Yard, (2) they have had at

least 80 hours on-the-job training in the Yard, or the Company determines that they are qualified to become Yard conductors without such training, and (3) they have passed the examination for Yard conductors. "Barney Yard brakemen promoted to Yard conductor shall establish a seniority date on the Yard conductor's roster on the date they pass the Yard conductor's examination. If two or more Barney Yard brakemen or Yard brakemen pass the Yard conductor's test on the same day, they shall establish seniority on the Yard conductor's roster in order of their Company seniority dates."

E. Barney Yardmen shall be eligible for selection to the position of assistant yardmaster and yardmaster on the same basis as Yard brakemen.

II

The Company shall fill all permanent vacancies in Group 1, Group 2 and Group 3, Transportation Department, Clerical positions according to the following procedures:

A. Whenever a new position is created or a vacancy occurs in a position under the Scope Rules of BRAC Agreement in the Transportation Department, it shall be bulletined by posting notices on Transportation Department bulletin boards and in Transportation Department bulletin books in all areas where employees subject to this agreement work. Each such notice shall set forth a brief description of the job, its rate of pay, the requirements for the job, and a statement of the nature and extent of training,

if any, on the job or otherwise, which will be provided to the successful bidders.

B. Unless and until such time as Groups 1, 2 and 3 seniority rosters are consolidated through a merger of the rosters on the basis of earliest seniority date by appropriate amendments to the collective bargaining agreement, all Group 1, Group 2 and Group 3 employees in the Transportation Department may bid on new positions or vacancies in Group 1, Group 2 and Group 3 jobs in the Transportation Department and use their earliest continuous seniority date as a basis for the bid. The job shall be awarded to the employee having the earliest continuous Company seniority date. Unless and until such time as the collective bargaining agreement is modified to provide for seniority to start at the time pay starts, seniority of employees transferring from one roster to another by bidding in and being awarded a bulletined position will, if they qualify, begin on the date they actually perform service on the position to which transferred. In the event that an employee with Group 3 seniority establishes Group 1 or Group 2 seniority, he shall retain his seniority in Group 3.

C. Whenever employees obtain a job by bidding which they have not held before, they shall be allowed thirty (30) working days in which to qualify, except when it is plainly seen, within less than thirty (30) working days, that they cannot qualify, unless a longer period is agreed to by the Company and BRAC. As already provided in Rule 9 of the applicable collective

bargaining agreement, employees will be given full cooperation of department heads and others in their efforts to qualify (Rule 9, Paragraph F). As already therein provided, applicants should be satisfied that they can qualify before making applications for positions (Rule 9, Paragraph G). In accordance with the principle of Rule 9, Paragraph H of the applicable collective bargaining agreement, if doubt exists as to the fitness and ability of an applicant, to qualify for a vacancy, the proper officer of the Company will confer with the Local Chairmen and with the two members of the Protective Committee who are elected by the Group 3 employees under the provisions of Article VIII B 2 of this decree and shall deal with the matter as mutually agreed. If it is determined that an employee originally hired in Group 3 prior to the date of this decree has not qualified for a job currently in Group 1 or Group 2, the Company shall give the employee a written notice, setting forth the grounds for his disqualification. A copy of this notice shall be placed in the employee's personnel file and a copy shall be sent to the plaintiff. If the employee desires to challenge any determination of the Company with regard to his qualifications he may do so under the appropriate provisions of the collective bargaining agreement. If the plaintiff wishes to challenge any determination of the Company which has not been sustained on the merits pursuant to Section 3 of the Railway Labor Act, with regard to any employee's qualifications, it may do so by filing an appropriate motion alleging violation of Title VII of the Civil Rights Act for review of the determination in this court. In the event that an employee currently with

Group 3 seniority bids successfully on a Group 1 or Group 2 job, but is disqualified by the Company, he may return to his Group 3 position within thirty (30) days, with no loss of seniority, provided same is not held by a senior employee in which case he may exercise a displacement right of junior employees in Group 3.

III

A. The Company shall discontinue use of its aptitude test entitled "Employment Qualification Form B" and no other general aptitude test shall be used by the Company as a controlling force in hiring until it has been properly validated as a predictor of future job performance in accordance with the present Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures, 35 F. R. 12333, et seq., 29 C. F. R. §§ 1607.1 to 1607.14.

B. The Company shall not require any presently employed black employee who was initially employed in Group 3 or as a Barney Yard brakeman to pass a test or meet any other condition for advancement to jobs in said crafts held by whites which is different or more stringent than a test or other condition of employment required of contemporaneously hired whites initially assigned to such jobs.

IV

A. The Company shall submit to the plaintiff, or to a designee having the approval of the court, the following information and reports,

not less frequently than semi-annually except where a different period is specified below.

1. A log showing by name and date or dates worked all present Barney Yard brakemen who worked in the Yard as brakemen during the preceding six months.

2. A log showing by name, race and date or dates worked all present Yard brakemen who worked in the Barney Yard as brakemen during the preceding six months.

B. A list of all persons presently employed as Barney Yard brakemen who during the next 180 days following the issuance of this decree have indicated to the Company in writing a desire to be trained for the position of Yard conductor. The list shall show the person's name, race (as reported to the Railroad Retirement Board on Form CER-1), the date on which he indicated his interest, the date on which he began training, the date or dates on which he took the conductor's examination, the date on which he passed the examination and the date on which he became a conductor, if applicable. The list shall be updated every six months. The Company shall retain all conductor examinations taken by present Yard brakemen and present Barney Yard brakemen for not more than five (5) years and shall make them available to plaintiff for inspection and copying upon reasonable notice. Each examination, and the corresponding oral examination, shall be clearly scored, marked "pass" or "fail" and signed by the person who scored it.

C. A list of persons by name who were hired as brakemen during the preceding six month period, giving date of hire and race as reported to the Railroad Retirement Board.

D. A list showing by job title all bulletined job vacancies in Groups 1 and 2 that were not filled by the senior bidder. The list shall show (1) the job title, (2) the date of bulletin, (3) the names and race (as reported to the Railroad Retirement Board) and seniority dates of all bidders, and (4) the person to whom the job was awarded. In the event the job was not awarded to the bidder with the earliest continuous seniority date, the Company shall require the Company Supervisor who made the promotion decision to state why the junior bidder was selected. This requirement may be met with a printed form on which is imprinted the usual bases for such selections with a check-off selection indicator. Such statement by such Company Supervisor shall not limit or bind the Company to show the full basis for selection in the event of any suit or petition for review in connection with such selection. The Company shall retain all bulletins and bids for Group 1 and Group 2 job vacancies and new positions for not more than three (3) years and make same available to the plaintiff for inspection and copy ing upon reasonable request.

E. A list showing by name, race (as reported to the Railroad Retirement Board), and applicable date all persons who during the preceding 12 month period, (1) established Group 1, Transportation Department, employment and/or seniority dates; (2) established Group 2,

Transportation Department, employment and/or seniority dates; and (3) established Group 3, Transportation Department employment and/or seniority dates. In the event group seniority rosters are merged, a list by name, race (as reported to the Railroad Retirement Board), and employment and/or seniority dates shall be furnished for the preceding 12 month period.

V

The Company shall make pertinent business records available to plaintiff, or to the designee appointed by appropriate order to supervise compliance with Executive Order 11246, for inspection and copying at reasonable times upon request.

VI

Every January for five (5) years after the date of this decree the Company shall send the court and plaintiff copies of its new seniority rosters for Yard brakemen, Yard conductors, Yardmasters, Barney Yard brakemen and Group 1, 2 and 3 employees in all department, including a racial identity of each individual as reported to the Railroad Retirement Board on Form CER-1. When an employee has once been racially identified, no further reporting on this item is necessary.

VII

A. Locals 1307 and 1916 of the United Transportation Union (formerly Lodges 268 and 1130 of the Brotherhood of Railroad Trainmen) shall

be consolidated on or before April 1, 1972. Both Locals shall surrender their charters and jointly apply to the International for a single new charter. All assets and liabilities of Locals 1307 and 1916 shall be transferred to the consolidated Local. The present local committees of the two locals shall become local committees of the consolidated local.

B. The Presidents of Locals 268 and 1130 shall arrange a joint meeting of the Locals to be held no later than thirty (30) days prior to the date of the consolidation of the Locals for the purposes of:

(1) Receiving nomination petitions for officers (not committeemen) of the consolidated Local;

(2) Establishing uniform Local dues;

(3) Adopting Local by-laws which shall include, but not limited to, provisions for time and place of meeting and salaries, if any, to be paid to officers; and

(4) The election of temporary officers. Written notice of such meeting and the purpose therefor must be extended by the Secretary of each defendant Local to the members under his jurisdiction and to the President of the United Transportation Union at least fifteen (15) days prior to such meeting.

C. At the first joint meeting of the Locals the members present shall elect a President, Vice-President and Secretary as temporary officers whose sole purpose is for conducting the election for which this joint meeting is called. (The officers of the separate locals shall continue in office for purposes of carrying on all business of the respective Local until superseded by the officers duly elected for the merged Local). No more than two of these offices may be held by persons who worked a majority of their time in either the Yard or the Barney Yard. Subsequent meeting of the Locals, if necessary, for the purposes set forth above in Paragraphs VII B(1) through (4) inclusive, will be scheduled as determined by the members present at each joint meeting. The temporary officers elected at the first joint meeting will serve until permanent officers have been elected in accordance with Paragraphs VII D below.

D. The first election of officers for the consolidated Local and any election held within five (5) years after the first election shall be conducted in the following manner and in accordance with the applicable laws and regulations of the United Transportation Union:

(1) Officers of the defendant Locals shall cooperate with the temporary officers as necessary in conducting the first election of officers.

(2) The President, Vice-President and Secretary shall be elected by the members of the consolidated Local provided that not more than

two of these offices may be held by persons who worked a majority of their time during the year prior to the election in either the Yard or the Barney Yard.

(3) The Chairman and two members of the Board of Trustees shall be elected by the members of the consolidated Local provided that not more than two of these offices may be held by persons who worked a majority of their time during the year prior to the election in either the Yard or the Barney Yard.

(4) The present Local Committees of Adjustment of the two Locals shall become Local Committees of the consolidated Local. When election for Local Committees of Adjustment are required under the UTU constitution, they shall be conducted in the manner hereinafter provided. Members of the consolidated Local who worked a majority of their time in the Yard during the year prior to the election shall elect a Local Chairman and a Grievance Committee to represent Local members in matters within its jurisdiction which arise from Yard work. Members of the consolidated Local who worked a majority of their time in the Barney Yard during the year prior to the election shall elect a Local Chairman and a Grievance Committee to represent Local members in matters within its jurisdiction which arise from Barney Yard work. Both Grievance Committees shall operate in accordance with the applicable laws and regulations of the United Transportation Union. Each Grievance Committee shall keep a record of all grievances presented to it, which shall include the name of the employee

presenting the grievance, the nature of the grievance, the date it was presented, what action was taken on the grievance, and if the Committee did not act on the grievance, the reasons why it did not act. For a period of five (5) years and not more than every six months, this record shall be submitted to the plaintiff on request by the plaintiff.

(5) The Delegate, Alternate Delegate, Legislative Representative and Alternate Legislative Representative, shall be elected by the members of the consolidated Local provided that: If the Delegate is a person who worked the majority of his time in the Yard during the year prior to the election, then the Alternate Delegate shall be a person who worked the majority of his time in the Barney Yard during the year prior to the election, but if the Delegate is a person who worked the majority of his time in the Barney Yard in the year prior to the election, then the Alternate Delegate shall be a person who worked the majority of his time in the Yard during the year prior to the election; and provided further that if the Legislative Representative is a person who worked a majority of his time in the Yard during the year prior to the election, then the Alternate Legislative Representative shall be a person who worked the majority of his time in the Barney Yard during the year prior to the election, but if the Legislative Representative is a person who worked a majority of his time in the Barney Yard during the year prior to the election, then the Alternate Legislative Representative shall be a person who worked the majority of his time in the Yard during the year prior to the election.

VIII

A. Lodges 362 and 1796 of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees shall be consolidated on or before April 1, 1972. Both Lodges shall surrender their charters and jointly apply to the Grand Lodge for a single new charter. All assets and liabilities of Lodges 362 and 1796 shall be transferred to the consolidated Lodge.

B. The first election of officers and any election held within five years after the first election shall be conducted in the following manner:

1. Lodge members who worked a majority of their time on positions in Group 1 or Group 2 during the year prior to the election shall select three persons and Lodge members who worked a majority of their time on positions in Group 3 during the year prior to the election shall select three persons to serveon a committee to nominate candidates for the offices of president, vice-president, recording secretary, financial secretary-treasurer, local chairman, legislative representative and chairman of the Board of Trustees. Not more than four (4) nor less that three (3) of these offices shall be held by former members of lodge 1796.

2. No less than two members of the

Protective Committee other than the chairman shall be appointed by the local chairman of the Lodge, subject to the approval of the Lodge members who worked a majority of their time in Group 1 or Group 2 during the year prior to the election, and no less than two members of this committee shall be appointed by the Local Chairman subject to the approval of Lodge members who worked a majority of their time in Group 3 during the year prior to the election. Said appointments to be made and approved at any regular or special meeting of the Lodge.

3. Two members of the Board of Trustees other than the chairman shall be elected by the Lodge members who worked a majority of their time on positions in Group 1 or Group 2 during the year prior to the election and two members of this board other than the chairman shall be elected by the Lodge members who worked a majority of their time on positions in Group 3 during the year prior to the election.

4. In the event the Lodge has an organization committee it shall be appointed by the President subject to Lodge approval, to consist of an equal number of members from those who worked a majority of their time on positions in Groups 1 or 2 during the year prior to the election and from those who worked a majority of their time on positions in Group 3 during the year prior to the election.

5. All voting shall be conducted in accordance

with the Constitution of the Grand Lodge, the Statutes for the Government of Lodges and the bylaws of the defendant Lodges and their successor.

C. When a grievance is presented which, in the opinion of the Local Chairman or two members of the Protective Committee requires handling before the next Lodge meeting, the grievance shall be filed without formal approval of the Lodge. When grievances are presented to the Lodge for approval, the grievance shall be sustained by a majority of the membership present or by a majority of the members working a majority of their time on positions in the Group where the grievance arose. The Protective Committee shall keep a record of all grievances presented to them, which shall include the name of the employee presenting the grievance, the nature of the grievance, the date it was presented, what action was taken on the grievance, and if the Committee did not act on the grievance, the reasons why it did not act. For a period of five years and not more than every six months, the record of grievances shall be submitted to the plaintiff on request by the plaintiff.

D. Lodge members who worked a majority of their time on positions in Group 1 or Group 2 during the year prior to a Grand Lodge Convention shall nominate one or more eligible members who so worked, and the members who worked a majority of their time on positions in Group 3 during the year prior to a Grand Lodge Convention shall nominate one or more eligible members who so worked to be Delegate to the Grand Lodge Convention. In the event there is more than

one member nominated from the members who worked on positions in Groups 1 or 2 or more than one member nominated from the members who worked on positions in Group 3, those members who so worked shall vote separately on those nominated from their work group or groups and the member receiving the highest number of votes shall then be the nominee from that group. Lodge members shall each cast one vote for either candidate. The persons receiving the larger number of votes shall be the Delegate to the Grand Lodge Convention and the persons receiving the smaller number of votes shall be the Alternate Delegate.

IX

A. The successor to BRAC Locals 362 and 1796 and the successor to BRT Locals 268 and 1130 shall each submit a written report to the court, copy to the plaintiff, on April 1, 1972, which shall set forth:

a. The numerical designation of the consolidated local.

b. The name, address, office title and former local membership of each local officer and committee member.

B. After each subsequent election of officers, committee members and convention delegates, each local shall submit a written report to the court, copy to the plaintiff or its designee setting forth the name, address, office title and former local membership of each officer, committee member and convention delegate.

C. The reporting obligation of the defendant unions under Section IX A and B of this decree shall terminate five (5) years after the date of this decree.

X

The Company shall publish and post this decree on all employee bulletin boards and shall notify all supervisory personnel at the Newport News Terminal of the Company's obligations under the decree.

XI

Lodges 362 and 1796 of BRAC and Locals 1307 and 1916 of UTU (formerly Lodges 268 and 1130 of BRT) and their successors shall in no way interfere with the defendant Chesapeake and Ohio Railway Company in its carrying out its obligations under this decree.

XII

This Court shall retain jurisdiction of this cause for five (5) years from the date of this decree for the purpose of enforcing this decree.

John A. MacKenzie
United States District Judge

MEMORANDUM AGREEMENT

Effective April 1, 1972

Whereas the United States District Court for the Eastern District of Virginia in the case of the United States of America versus The Chesapeake and Ohio Railway Company, et al in Civil Action No. 1469-NN has ORDERED the parties pursuant to its Decree dated December 8, 1971, to negotiate an Implementing Agreement merging the Yard Brakemen's roster and the Barney Yard Brakemen's roster at Newport News, Virginia on a "top and bottom" basis.

Pursuant to that Decree, it is agreed as follows:

1. Effective April 1, 1972, Barney Yardmen will be placed at the bottom of the Yard Brakemen's seniority roster with a seniority date of April 1, 1972 in the order of their standing on the Barney Yardmen's seniority roster and will have prior rights to work as Barney Yardmen.

2. Effective April 1, 1972, Yard Brakemen will be placed at the bottom of the Barney Yardmen's seniority roster with a seniority date of April 1, 1972 in the order of their standing on the Yard Brakemen's seniority roster and will have prior rights to work as Yard Brakemen.

3. Effective April 1, 1972, new hires will establish seniority on a single seniority roster. Such seniority will be established on that roster based on first service performed in either the Classification Yard or Barney Yard.

4. Barney Yardmen and Yard Brakemen holding rights will not be forced to accept employment or fill vacancies as Barney Yardmen or Yard Brakemen except where they now hold prior seniority as Barney Yardmen or Yard Brakemen and then in accordance with the agreement rules applicable to their prior right seniority.

5. Separate Barney Yardmen and Yard Brakemen extra lists will be maintained.

In the application of the foregoing the following will apply:

(A) Prior right Barney Yardmen or Yard Brakemen may fill vacancies in the Barney Yard or Classification Yard not filled by prior right employees and may exercise their seniority rights in accordance with their standing on the "top and bottom" rosters and in accordance with applicable seniority rules to displace a junior Barney Yardman or Yard Brakeman who does not hold prior rights in the Barney Yard or Classification Yard.

(B) Barney Yardmen voluntarily exercising seniority as Yard Brakemen in the Classification Yard will be required to remain in that Yard for a period of 30 days* except where they can no longer hold an assignment in that Yard. A Barney Yardman who does not stand for work in the

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NOTE: The 30 days* or 3 days referred to above will commence to run on the date he voluntarily exercises seniority or is notified of his recall.

Barney Yard may exercise seniority to the Classification Yard and upon being recalled to the Barney Yard, will be given 3 days to return to the Barney Yard. However, if he elects to remain in the Classification Yard, he will be treated as an employee making a voluntary move based on the date he is recalled to the Barney Yard. The Barney Yard men will be required to remain in that yard for a period of 30 days* except when they can no longer hold an assignment in that yard. A Yard Brakeman who does not stand for work in the Classification Yard may exercise seniority to the Barney Yard and upon being recalled to the Classification Yard, will be given 3 days to return to the Classification Yard. However, if he elects to remain in the Barney Yard he will be treated as an employee making a voluntary move based on the date he is recalled to the Classification Yard.

(D) Employees hired after the effective date of this Agreement and given seniority on a single seniority roster will be required to fill assignments either on the Barney Yard or Classification Yard in accordance with Barney Yardmen's or Yardmen's Agreements. However, such employee assigned in either the Barney Yard or Classification Yard may exhaust his seniority rights in either yard prior to being required to exercise seniority in the other yard.

NOTE: The 30 days* or 3 days referred to above will commence to run on the date he voluntarily exercises seniority or is notified of his recall.

This Agreement signed at Baltimore, Maryland, this 24th day of January, 1972.

Robert Hart
General Chairman
United Transportation Union

H. E. Stephenson
Director of Labor Relations
The Chesapeake and Ohio Railway Company

John A. MacKenzie
United States District Judge

*Changed to 30 days by agreement of all counsel. Per telephone conversation with Joseph B. Geyer:

Approved By:

John A. MacKenzie
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1297

United States of America,
Appellant,

v.

The Chesapeake and Ohio Railway Company, a Corporation; Locals 268 and 1130 of The Brotherhood of Railroad Trainmen; and Locals 362 and 1796 of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees,
Appellees.

No. 72-1298

United States of America,
Appellee,

v.

Locals 268 and 1130 of the Brotherhood of Railroad Trainmen,
Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Newport News. John A. MacKenzie, District

(Argued October 4, 1972---Decided December 26, 197

Before BOREMAN, Senior Circuit Judge, and WINTER and BUTZNER, Circuit Judges.

BUTZNER, Circuit Judge:

The United States brought this action under Title VII of the Civil Rights Act of 1964[1], against

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. Section 703 (a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(a), provides:

It shall be an unlawful employment practice or an employer

(1) to fail or refuse to hire or to discharge any ndividual, or otherwise to discriminate against any ndividual with respect to his compensation, terms, onditions, or privileges of employment, because of uch individual's race, color, religion, sex or ational origin; or

(2) to limit, segregate, or classify his employees any way which would deprive or tend to deprive any dividual of employment opportunities or otherwise dversely affect his status as an employee, because such individual's race, color, religion, sex or tional origin.

Section 707 (a), 42 U. S. C. §2000e-6 (a) provides r civil actions by the Attorney General:

Whenever the Attorney General has reasonable use to believe that any person or group of persons engaged in a pattern or practice of resistance to the l enjoyment of any of the rights secured by this bchapter, and that the pattern or practice is of such ature and is intended to deny the full exercise of rights herein described, the Attorney General may ng a civil action in the appropriate district court the United States by filing with it a complaint (1) ned by him (or in his absence the Acting Attorney neral), (2) setting forth facts pertaining to such tern or practice, and (3) requesting such relief, luding an application for a permanent or temporary nction, restraining order or other order against person or persons responsible for such pattern or ctice, as he deems necessary to insure the full oyment of the rights herein described.

the Chesapeake and Ohio Railway Company, Locals 268 and 1130 of the Brotherhood of Railroad Trainmen (now locals 1307 and 1917 of the United Transportation Union), and Locals 362 and 1796 (now Lodge 349) of the Botherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees[2]. The government alleged that the company and the unions engaged in discriminatory employment practices at the C&O's Newport News terminal, and that their collective bargaining agreements and the unions' segregated membership policies tended to perpetuate the effects of this discrimination.

The district court found no post-Act discriminatory hiring by the C&O. It ordered:

¶ the merger of two racially segregated BRAC clerks' locals;

¶ the merger of two racially segregated BRT brakemen's locals;

¶ the discontinuance of specified C&O employment qualification tests because they were not a measure of job performance;

¶ retention of jurisdiction for five years and

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2. In this opinion, we will refer to the Railway Company as the C&O or the company, and to the Brotherhood of Railway, Airline, and Steamship Clerks, etc., as BRAC. Although the Brotherhood of Railroad Trainmen is now merged into the United Transportation Union, the locals have been designated throughout this litigation as BRT locals and we will continue this nomenclature.

the submission of compliance reports at stated intervals. No party has appealed from these provisions of the decree.

The district court also found that the C&O had not engaged in pre-Act discrimination, and that it maintained bona fide seniority systems. Nevertheless, the court granted relief to facilitate progression of some employees to higher job classifications and to eliminate certain abrasive features of the seniority systems at the terminal. From these provisions of the decree, the government appeals, claiming that the evidence discloses pre-Act racial discrimination and asking for further relief to eliminate the unnecessary present effects of past discrimination. Specifically, the government contends that current seniority rosters and transfer policies, while racially neutral, perpetuate the effects of past discrimination by confining black employees to inferior, traditionally black jobs. The BRT locals cross-appeal from a provision of the court's decree that directs the utilization of company seniority to establish rank on the general yard conductor's roster.

In considering these appeals, we have the benefit of two cases--published after the opinion of the district court had been filed--that deal with racial discrimination in railway employment. [3] Guided

3. United States v. St. Louis-SanFrancisco Ry. 464 F. 2d 301 (8th Cir. 1972), petition for cert. filed, 41 U.S.L.W. 3289 (U.S. Nov. 10, 1972) (No. 72-715); United States v. Jacksonville Terminal Co., 451 F. 2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972).

largely by these cases and other recent precedents, we grant substantially the relief which the government seeks and deny the BRT locals' cross-appeal.

Because the C&O has hired black brakemen and black clerks without discrimination since the effective date of the Act, the remedies that we order concern only black employees who were hired under the company's pre-Act employment policies. Parts I, II and III of this opinion deal with the brakemen, conductors, and clerks, respectively, and Part IV considers the issue of "cross-craft" relief.

I

Brakemen work in one of two places, the general yard[4] or the Barney yard. All general yard employees, which include brakemen and conductors, are members of BRT (white) Local 268; all Barney yard brakemen are members of BRT (black) Local 1130.

Before 1914, an all-black work force employed by an independent contractor loaded export coal on ships. In that year, after constructing a coal pier which is now a part of the Barney Yard, the C&O hired the contractor's employees. Thus, the Barney Yard was all-black from its inception. The general yard at that time was racially mixed,

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4. We have adopted the terminology of the parties and use the phrase "general yard" to refer to the general yard and the classification yard.

ut it later became exclusively white.

In 1918 the Barney Yard brakemen, through eir yard committee, entered into an agreement ith the C&O[5], which provided that Barney yard iders will be "classed and paid as yard brakemen," nd that "seniority rights of the men on the Barney ard and on the general yard will be separate and stinct." Although this agreement made no ention of race and was designed to equalize the ay of brakemen, it was regarded by the C&O and s employees as a segregation agreement. Until 57, when the company suspended hiring, white akemen were hired only at the general yard and ack brakemen only at the Barney yard. The racially entifiable pattern that emerged is illustrated by e seniority rosters for each yard. Prior to nuary 1, 1970, when the company resumed hiring akemen, the 193 employees on the general yard ere white, and the 164 Barney yard brakemen ere black.

Opportunities for promotion are greater in e general yard than in the Barney yard. General rd brakemen can advance to yard conductor, sistant yardmaster, yardmaster, and manage- nt positions. None of those jobs are open to rney yard brakemen. The senior Barney yard akemen on each shift may operate the car

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At the time the agreement was signed the npany was under the control of the government a result of the December 26, 1917 proclamation ch established the United States Railroad ministration.

retarder, a job which pays more than a brakeman's on either yard, and the senior man on each crew acts as foreman. There are no other avenues of advancement. Supervisors of the Barney yard are white.

Brakemen in both yards are paid on the same scale, although some Barney yard brakemen near the top of their seniority roster make larger annual salaries than general yard brakemen. Nevertheless, the average gross earnings of Barney yard brakemen are 20 per cent less than those of general yard brakemen because work is more irregular in the Barney yard than in the general yard.[6]

The company and the unions challenge the government's allegation that the C&O formerly discriminated on the basis of race. They argue that the government has failed to prove any overt act, agreement, or policy by the C&O in hiring and assigning new brakemen, that the government has failed to establish any "pattern or practice" of discrimination, and that mere statistical evidence of segregation does not establish discrimination. These arguments fail to perceive the impact of recent cases which hold that statistical evidence is sufficient to establish at least a prima

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. Between January 1, 1960 and December 31, 969, all Barney yard crews were cancelled 189 mes, and fewer than 15 Barney yard brakemen orked on 319 other occasions. During the same ecade, the number of general yard brakemen fell elow 15 only once, and all general yard crews ere never cancelled.

facie case of discrimination in Title VII litigation.[7] Since the employment statistics demonstrated that pre-Act hiring racially segregated both the general yard and the Barney yard, the burden shifted to the C&O to come forward with evidence to show that it had never discriminated in hiring black brakemen.[8]

The company, however, has failed to refute the government's prima facie case. Indeed, the C&O's answers to interrogatories proved that from 1918 until the effective date of the Act the company hired only white men at the general

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7. See, e.g., United States v. St. Louis-San Francisco Ry., 464 F. 2d 301, 307 (8th Cir. 1972), petition for cert. filed, 41 U.S.L.W. 3289 (U.S. Nov. 10, 1972) (No. 72-715); Brown v. Gaston County Dyeing Mach. Co., 457 F. 2d 1377, 1382 (4th Cir. 1972); United States v. Hayes Int'l Corp., 456 F. 2d 112, 120 (5th Cir. 1972); United States v. Iron workers Local 86, 443 F. 2d 544, 550 (9th Cir.), cert. denied, 404 U.S. 984 (1971); Jones v. Lee Way Motor Freight, Inc., 431 F. 2d 245, 247 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971)

8. United States v. Hayes Int'l Corp., 456 F. 2d 112, 120 (5th Cir. 1972); United States v. Ironworkers Local 86, 443 F. 2d 544, 550 (9th Cir.), cert. denied, 404 U.S. 984 (1971); Cypress v. Newport News Gen. and Nonsectarian Hosp. Ass'n, 375 F. 2d 648, 654 (4th Cir. 1967); Chambers v. Hendersonville City Bd. of Educ., 364 F. 2d 189, 192 (4th Cir.1966).

yard. The participation of the black brakemen through their yard committee and union in establishing the company's hiring policy and the acquiescense of the government in the segregation of the yards did not make the discrimination any less real.[9] Moreover, evidence that the company practiced decentralized hiring for the yards and that the vacancies were filled by referral from incumbents are indicia of discrimination that sustain rather than disprove the government's charge.[10]

We conclude, therefore, that the C&O's pre-Act hiring practices discriminated against black brakemen. Standing alone, however, pre-Act discrimination is insufficient to maintain a cause of action under Title VII; to be actionable, the proof must show present effects of the past discrimination.[11] The present mechanism of discrimination, the government asserts, is the

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9. United States v. St. Louis-San Francisco Ry., 464 F. 2d 301, 309 (8th Cir. 1972), petition for cert. filed, 41 U. S. L. W. 3289 (U. S. Nov. 10, 1972) (No. 72-715); United States v. Jacksonville Terminal Co., 451 F. 2d 418, 454 (5th Cir. 1971), cert. denied, 406 U. S. 906 (1972); Robinson v. Lorillard Corp., 444 F. 2d 791, 799 (4th Cir.), cert. denied, 404 U. S. 1006 (1971)

10. Brown v. Gaston County Dyeing Mach. Co., 457 F. 2d 1377, 1383 (4th Cir. 1972); Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421, 426 (8th Cir. 1970); cf. Jones v. Lee Way Motor Freight, Inc., 431 F. 2d 245, 247 (10th Cir. 1970), cert. denied, 401 U. S. 954 (1971).

11. Robinson v. Lorillard Corp., 444 F. 2d 791, 795 (4th Cir.), cert. denied, 404 U. S. 1006 (1971).

company's practice, embedded in its collective bargaining agreements, of denying black Barney yard brakemen who were employed before the company reformed its hiring policies, their company seniority should they seek employment in the general yard.

The evidence disclosed that the company maintains separate seniority rosters for each yard and that its collective bargaining agreements with the BRT prevent men in one yard from bidding on jobs in the other. The present effects of pre-Act discrimination are readily discernable. The Barney yard brakeman who was initially denied employment in the general yard because of his race cannot now take advantage of the more favorable working conditions in the general yard without forfeiting his company seniority. Because of the critical importance of seniority, a Barney yard brakeman is thus frozen or locked into a less desirable job than his white counterpart who was hired at the same time in the general yard.

The C&O and the union seek to justify their present regulations on two grounds. They contend first that the yard or departmental seniority system is validated by section 703 (h) of the Act.[12] The courts of appeals

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12. Section 703 (h), 42 U.S.C. §2000e-2 (h), provides in part:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin . . .

dealing with the subject have rejected similar arguments and held that seniority systems which perpetuate past racial discrimination violate the Act.[13] Two recent cases have applied this principle to railroad employment substantially similar to the C&O's.[14]

The company and the union next assert that business necessity justifies forbidding Barney yard brakemen from transferring to the general yard while retaining their company seniority. The test of business necessity, we recently held, "is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice

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13. United States v. Bethlehem Steel Corp., 446 F. 2d 652, 658 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F. 2d 791, 796 (4th Cir.), cert. denied, 404 U.S. 1006 (1971); Local 189, Papermakers & Paperworkers v. United States, 416 F. 2d 980, 988 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); United States v. Sheet Metal Workers Local 36, 416 F. 2d 123, 133 n. 20 (8th Cir. 1969); United States v. Hayes Int'l Corp., 415 F. 2d 1038, 1044 (5th Cir. 1969); cf. Jones v. Lee Way Motor Freight, Inc. 431 F. 2d 245, 248 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971).

14. United States v. St. Louis-San Francisco Ry., 464 F. 2d 301, 307 (8th Cir. 1972), petition for cert. filed, 41 U.S.L.W. 3289 (U.S. Nov. 10, 1972) (No. 72-715); United States v. Jacksonville Terminal Co., 451 F. 2d 418, 448 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972).

is necessary to the safe and efficient operation of the business."[15] Measured by this standard, we find no merit in the defense of business necessity.

The record does not demonstrate that black brakemen are incapable of working in the general yard. Indeed, some Barney yard brakemen have worked there satisfactorily on an emergency basis in the past. In both yards the men perform many similar tasks. In addition, general yard brakemen must know how to control trains, by signals, and be familiar with rules and regulations governing the movement and switching of trains in and out of the yard and on the road. Despite these requirements, a brakeman's job in the general yard is an entry level position, which the employee learns as he works. The most junior Barney yard brakemen eligible to transfer to the general yard were employed before 1958. There is no proof that a brakeman with

15. Robinson v. Lorillard Corp., 444 F. 2d 791, 798 (4th Cir.), cert. denied, 404 U. S. 1006 (1971). Accord, Griggs v. Duke Power Co., 401 U. S. 424, 431 (1971); United States v. St. Louis-San Francisco Ry., 464 F. 2d 301, 308 (8th Cir. 1972), petition for cert. filed, 41 U. S. L. W. 3289 (U. S. Nov. 10, 1972) (No. 72-715); Rowe v. General Motors Corp., 457 F. 2d 348, 354 (5th Cir. 1972); United States v. Jacksonville Terminal Co., 451 F. 2d 418, 451 (5th Cir. 1971) cert. denied, 406 U. S. 906 (1972); United States v. Bethlehem Steel Corp., 446 F. 2d 652, 662 (2d Cir. 1971); Jones v. Lee Way Motor Freight, Inc., 431 F. 2d 245, 249 (10th Cir. 1970), cert. denied, 401 U. S. 954 (1971); Local 189, United Papermakers & Paperworkers v. United States, 416 F. 2d 980, 989 (5th Cir. 1969), cert. denied, 397 U. S. 919 (1970).

fourteen years' Barney Yard experience cannot qualify as readily in the general yard as an inexperienced man hired off the street. When a Barney Yard brakeman has qualified to fill a vacancy in the general yard, no reason founded on business necessity is disclosed by the evidence for denying him his company seniority.

To remedy the disadvantages suffered by the Barney yard brakemen the court decreed the merger of the seniority roster of both yards on a "top and bottom" basis. All Barney yard brakemen were placed at the bottom of the general yard seniority roster in the order of their rank on the Barney yard roster. Similarly, all general yard brakemen were placed at the bottom of the Barney yard roster in the order of their rank on the general yard roster. All brakemen were allowed to bid on jobs in either yard. The relief granted by the district court is paradoxically unnecessarily broad and unduly restrictive. It is too broad because it allows general yard brakemen to bid on Barney yard jobs and it permits Barney yard brakemen who were hired after the effective date of the Act to bid on general yard jobs. Neither of these classes of employees were the victims of discrimination, and the relief ordered by the district court need not embrace them.[16] The government does not request and nothing in the Act commands such a drastic overhaul of the C&O's departmental and seniority structure. At the same time the

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16. See United States v. Bethlehem Steel Corp., 446 F. 2d 652, 665 (2d Cir. 1971).

decree is too restrictive because it does not allow Barney yard brakemen hired before the Act the benefit of their company seniority when they transfer to jobs that were previously denied them because of their race. They are still relegated to a position inferior to white employees who were hired after them. It was precisely this type of restriction that was condemned by the Court of Appeals for the Eighth Circuit when it held that black train porters who suffered pre-Act discrimination should have the benefit of company seniority when they transferred to vacancies on the brakemen's roster.[17]

Accordingly, on remand the district court should enter a decree that will enable qualified Barney yard brakemen who were employed before the effective date of the Act to exercise their company seniority with respect to: (a) filling general yard vacancies, including those caused by furloughs, and (b) thereafter enjoying all other prerogatives dependent on seniority. Of course, the company and the union may agree to a broader merger of the seniority rosters or to eradicate other distinctions between the yards, provided that the company seniority of the Barney yard brakeman hired before the Act is fully recognized.

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17. United States v. St. Louis-San Francisco Ry., 464 F. 2d 301, 308 (8th Cir. 1972), petition for cert. filed, 41 U.S.L.W. 3289 (U.S. Nov. 10, 1972) (No. 72-715); accord, United States v. Jacksonville Terminal Co., 451 F. 2d 418, 458 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972).

Yard conductors receive more pay than brakemen, but the position has been open only to white employees because the C&O selected its conductors from the general yard. A black brakeman hired before the effective date of the Act, regardless of his education or ability, was not eligible for promotion to conductor. To correct this violation, the district court set forth a three-step procedure for Barney yard brakemen to qualify for the position: (1) two years experience in the Barney yard; (2) a minimum of 80 hours on-the-job training in the general yard, unless the company determines they are qualified without such training; (3) passing the yard conductor's examination. The decree provided, however, that Barney yard brakemen would establish seniority on the yard conductors' roster on the day they passed the examination. The decree provided, however, that Barney yard brakemen would establish seniority on the yard conductors' roster on the day they passed the examination, and their company seniority date would be considered only if both a general yard brakeman and a Barney yard brakeman pass the examination the same day. No party complains about the three qualifications the district court required. However, the BRT appeals the tie-breaking provision concerning seniority, asserting that a yard brakeman should always prevail on the basis of his general yard experience. The government proposes that all Barney yard brakemen should establish yard conductor seniority as of their company seniority date.

The most junior Barney yard brakeman who was employed before the C&O reformed its hiring policies already has approximately fourteen

years experience as a brakeman. There is no proof in the record that a Barney yard brakeman with at least this much seniority who has passed the C&O conductor's examination and undergone the 80 hours training required by the district court is not as well qualified as a white brakeman with less company seniority. Since Barney yard brakemen were ineligible for promotion to conductor until the court entered its decree, ranking them on the conductor's roster by the date of examination simply perpetuates the racial discrimination that initially barred them from becoming conductors. Only when the Barney yard brakemen can assert their company seniority for all purposes will present effects of past discrimination be fully eradicated.

White general yard brakemen are currently ranked on the seniority roster by the date they pass the conductor's examination. Therefore, if only the black Barney yard brakemen are ranked by company seniority, in certain instances they would achieve super-seniority to which they are not entitled under the Act.[18] To avoid super-seniority, the government suggests that all brakemen on the conductors' roster, regardless of race, be ranked by their company seniority. But this remedy is unnecessarily sweeping, for if all brakemen are ranked by company seniority on the conductor's roster, certain general yard

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[18] See United States v. Bethlehem Steel Corp., 446 F. 2d 652, 661 (2d Cir. 1971); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 519 (E.D. Va. 1968).

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rakemen may be displaced by other general
ard brakemen with more company but less
onductor seniority.

Accordingly, on remand the district court
ould modify its decree to provide that as between
Barney yard brakeman and a general yard
rakeman or between two Barney yard brakemen
mpeting for a conductor's job, company seniority
all determine rank; and as between two general
ard brakemen, the present conductor's roster
nk may be retained. The C&O and the union
ay, of course, agree to dovetail the conductor's
ster on the basis of company seniority or to
odify it in any other nondiscriminatory way that
es not diminish the full use of company seniority
the black Barney yard brakemen who were
red before the Act.

III

When the government filed its complaint in
68, the C&O's clerical craft employees, who
e represented by the Brotherhood of Railway
d Airline Clerks (BRAC), were divided into
ree groups. The C&O maintained separate
niority rosters for each group, and an employee's
nk determined the preference that he enjoyed in bidd
r jobs. Transfer from one group to another, while
ntractually possible, was severely restricted. The
idence also established that before the effective
te of Title VII, black employees were relegated
less desirable positions as laborers. This
mbination of discriminatory pre-Act hiring and
rrent restrictive transfer policies depicts a

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present pattern of discrimination.[19] As late as 1970, the three groups of clerical craft employees were racially identifiable. Group 1, composed of office, clerical, and supervisory personnel, consisted of 214 white and 2 black employees. Group 2, the messengers, guards, and telephone operators, was composed of 87 white and 2 black employees. In contrast, of 162 Group 3 laborers, 158 were black. The C & O has not rebutted the prima facie case proved by these statistics. Although the black laborers in Group 3 have had a contractual right to bid on Group 1 or 2 jobs since 1936, attempts to advance to these positions were rebuffed by the company, and no black employee established Group 1 or 2 seniority until 1966. By the time the case was tried in 1971, only 10 Group 3 employees had established seniority in the other groups.

19. United States v. St. Louis-San Francisco Ry., 464 F2d 201, 207 (8th Cir. 1972), petition for cert. filed, 41 U.S.L.W. 3289 (U.S. Nov. 0, 1972) (No. 72-715); United States v. Hayes nt'l Corp., 456 F. 2d 112, 117 (5th Cir. 1972); Jnited States v. Jacksonville Terminal Co., 451 F. 2d 419, 448 (5th Cir. 1971), cert. denied, 406 J.S. 906 (1972); United States v. Bethlehem Steel Corp., 446 F. 2d 652, 658 (2d Cir. 1971); Robinson . Lorillard Corp., 444 F. 2d 791, 795 (4th Cir.), ert. denied, 404 U. S. 1106 (1971); United States . Ironworkers Local 86, 443 F. 2d 544, 552 (9th ir.), cert. denied, 404 U. S. 984 (1971); Jones v. ee Way Motor Freight, Inc., 431 F. 2d 245, 248 0th Cir. 1970), cert. denied, 401 U. S. 954 (1971); ocal 189 Papermakers & Paperworkers v. United tates, 416 F. 2d 980, 988 (5th Cir. 1969), cert. enied, 397 U. S. 919 (1970).

The union's racial policies reflected the company's. The local lodges of BRAC were virtually segregated. Group 1 and 2 employees belonged to BRAC Local 362. Some Group 1 and 2 employees and all Group 3 employees belonged to BRAC Local 1796.

The district court, recognizing the discrimination against black Group 3 laborers, ordered that they be allowed to bid for Group 1 and 2 vacancies on the basis of their company seniority until the collective bargaining agreement merged the rosters. It also ordered merger of the segregated BRAC locals.

Pending appeal, BRAC and the C & O, along with 167 other Class I railroads, amended their collective bargaining agreements to settle a jurisdictional dispute between the Clerks' union and the telegraphers' union over railroad communications work. To implement this agreement, BRAC and the C & O merged the separate group seniority rosters and relaxed the rules for bidding on future vacancies to the extent that the government stipulates that the agreement provides "all the intra-craft relief sought for Group 3 employees at the Newport News terminal." The government does, however, assert that since the company and the union are free to return to their former discriminatory practices, injunctive relief is proper. The company and the union urge that the controversy concerning the clerical crafts is now moot, and that no injunctive relief is warranted.

The C & O and the union have failed to show that "subsequent events (have) made it absolutely

clear that the allegedly wrongful behavior could not reasonably be expected to recur, "[20] and, therefore, this aspect of the case is not moot. In addition, the following factors persuade us that the government's request for injunctive relief should be granted. The modification of the collective bargaining agreement was not made to correct the discrimination against the Black Group 3 laborers. Rather, the benefit they received was simply a collateral result of the settlement of a jurisdictional dispute between the clerks and the telegraphers. Both the C & O and the union have consistently asserted that their virtual segregation of black laborers into low paying jobs and a separate local did not violate the Act, although both the evidence and the law warrant a contrary conclusion. Moreover, the C & O still persists, as evidenced by its current terms of employment for the Barney Yard brakemen, in perpetuating the effects of past discrimination. In view of these factors, we believe that the government has carried its burden of showing that "there exists some cognizable danger of recurrent violation."[21] Therefore, on remand the court shoul d grant the govem ment's motion for injunctive relief paralleling the amendment to BRAC's collective bargaining agreement.

20. United States v. Concentrated Phosphate Export Ass'n, Inc., 393 U.S. 199, 203 (1968).

21. United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953). Accord, Rowe v. General Motors Corp., 457 F2d 348, 359 (5th Cir. 1972); Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421, 426 (8th Cir. 1970); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F. 2d 648, 657 (4th Cir. 1967).

IV

The government also seeks limited cross-craft relief.[22] It asks that black Barney yard brakeman be allowed to bid on vacancies in the clerical craft, that black Group 3 employees be allowed to bid on brakeman's vacancies, and that both be authorized to use their company seniority for all purposes in their new job. The issues posed by the government's request have been considered by two other courts of appeals, which in well reasoned opinions allowed cross-craft relief.[23]

22. The government sought cross-craft relief against 15 other unions, but the district court denied the government's motion to join these unions because it was untimely. The government has not appealed this issue. Instead, it limits its request for cross-craft relief to the two crafts represented by unions whose locals are parties to the suit -- the brakemen and the clerks. The District court criticized as untimely the request for cross-craft relief involving these two crafts, but it nevertheless dealt with the question on its merits.

23. United States v. St. Louis-San Francisco Ry., 464 F. 2d 301 (8th Cir. 1972), petition for cert. filed, 41 U. S. L. W. 3289 (U. S. Nov. 10, 1972) (no. 72-715); United States v. Jacksonville Terminal Co., 451 F. 2d 418 (5th Cir. 1971), cert. denied, 406 U. S. 906 (1972).

Cross-craft relief has also been allowed in the trucking industry, United States v. Central Motor Lines, Inc., 338 F. Supp. 532 (W. D. N. C. 1971); cf. Jones v. Lee Way Motor Freight, Inc., 431 F. 2d 245 (8th Cir. 1970), cert. denied, 401 U. S. 954 (1971).

At the outset it must be recognized that the relief which the government seeks will require the modification of some of the provisions of the collective bargaining agreements of both the brakemen and the clerks. The company and the unions, resisting any change in these agreements, emphasize that the craft system, upon which the agreements are based, originated in General Order No. 27, promulgated by the Director General of Railroads during World War I. The genesis of the C & O's craft and seniority policies does not, however, exempt its current bargaining agreements from the Act. Speaking of the same Order, Judge Dyer wrote in Jacksonville Terminal:

> These labor representatives fail to perceive that their pre-Act discriminatory policies, practices, and "understandings" - whether formal or informal - have compromised the racially neutral integrity of that venerable Order and its interpretative supplements..... At the Terminal today, blacks continue to experience the effects of pragmatic injustice; certainly this situation contravenes the avowed purpose of the Order and the Railway Labor Act.....
>
> That hoary collective bargaining agreements now mandate perpetuation of past aberrations from the governmental policy does not affect the propriety of judicial action.[24]

And in a similar vein, Judge Ross wrote in the St. Louis-San Francisco Railway Company case:

24. 451 F. 2d at 454.

> It is true that Frisco could not have permitted a transfer of train porter seniority to the brakemen's roster without breaching its agreement with (the United Transportation Union), but "(t)he rights assured by Title VII are not rights which can be bargained away - either by a union, by an employer, or by both acting in concert. Title VII requires that both union and employer represent and protect the best interests of minority employees." Robinson v. Lorillard Corp. . . . The UTU is not immune from the duties imposed by Title VII; it is a party to this action, and it will have to accommodate itself to revisions in its contracts and its rules and regulations which may be necessary to assure compliance with the Act.[25]

We agree with the Jacksonville Terminal and Frisco courts that neither General Order No. 27 nor current collective bargaining agreements bar application of the Act.

The unions counter with the argument that in Jacksonville Terminal and Frisco the national labor organizations, which are the collective bargaining agents of the employees, were parties to the suits. Here the court declined to join the national unions. Their absence is of no moment. The locals, as agents of the national organizations, are before the court, and they adequately represent the unions' interests. This was demonstrated by the prompt compliance of the general chairman of the United Transportation Union with the decree

25. 464 F. 2d at 309.

of the court changing the seniority rosters of the brakemen in the general and Barney yards. We anticipate that the absence of the national labor organizations will present no obstacle to the district court's order, but if it becomes necessary to add new parties to execute the decree, the district court has ample authority to do so.[26]

The C & O and the unions urge that the present system of crafts and seniority is necessary to efficiently perform the company's business. A good deal of their argument is based on a misapprehension of Title VII and the remedies appropriate to enforce it. The defendants envision havoc if all 24,000 of the C & O's employees are entitled to use company seniority to bid for vacancies across craft lines. The short answer to their fears is that the law does not command this result. Title VII does not require either the company or the unions to forego the benefits afforded management and employees by nondiscriminatory craft, departmental, and seniority systems.[27] Application of the Act normally involves two steps. First, identification of the employees who are victims of discrimination, and second, prescription of a remedy to correct the violation disclosed by the first step. The Act does not require the application of the remedy to employees who are not subject to discrimination.[28] The government

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26. Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 234 (1964).

27. Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 519 (E.D. Va. 1968).

28. See United States v. Bethlehem Steel Corp., 446 F.2d 652, 665 (2d Cir. 1971).

concedes that the C & O reformed its hiring policies by the time the Act became effective. Therefore, we are concerned only with those black employees who were hired before the Act and who, because of restrictive transfer policies, are presently unable, without forefeiting their company seniority, to move to jobs previously denied them. Specifically, since this case involves two crafts, a remedy need be fashioned only for the black Barney yard brakemen and the black Group 3 laborers who were employed before the C & O ceased its discriminatory hiring policies.

The Company and the union contend that many of the black employees are not competent to fill jobs as brakemen or in Groups 1 and 2 of the clerical craft. This may well be true, and the Act does not require the company to employ or transfer a person who is not capable of doing the job for which he applies. But the Act does require the company to assess an employee's ability without regard to his race using only job related criteria.[29] A brakeman's job is an entry level position, and there are many entry level positions in Groups 1 and 2. These jobs can be as efficiently performed by qualified transferees as by new employees. Moreover, some black employees who have the advantage of long experience in the railroad industry may be able to fill non-entry level jobs with little or no additional training. Measuring their qualifications for these positions is not an impossible task. Business necessity does not dictate that a qualified employee must forfeit his company seniroity when he transfers to a position which previously was denied him because of his

29. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

race.[30] Resolving this issue in Jacksonville Terminal, Judge Dyer wrote, "We hold that continued use of the craft and class seniority systems to restrict the transfer and promotion opportunities of incumbent black employees at the Terminal is neither bona fide nor a business necessity; such systems necessarily exclude blacks from jobs for which they might otherwise qualify."[31]

In sum, we find no bar to cross-craft relief in the origins of the craft and departmental seniority systems, in the current collective bargaining agreements, or in the doctrine of business necessity. Accordingly, on remand the district court should enter a decree that will enable black barney yard brakemen and black Group 3 employees who were hired before the effective date of the Act to bid across craft lines for brakemen and clerical vacancies for which they are qualified, carrying with them their company seniority.

The judgment of the district court is vacated in part and the case is remanded for further proceedings consistent with this opinion.

). United States v. Bethlehem Steel Corp., 446 . 2d 652, 662 (2d Cir. 1971); Robinson v. Lorillrd Corp., 444 F. 2d 791, 799 (4th Cir.), cert. enied, 404 U.S. 1006 (1971); Jones v. Lee Way otor Freight, Inc., 431 F. 2d 245, 250 (10th Cir. 70), cert. denied, 401 U.S. 954 (1971); Local 9, United Papermakers & Paperworkers v. nited States, 416 F. 2d 980 (5th Cir. 1969), cert. enied, 397 U.S. 919 (1970).

. 451 F. 2d at 453. Accord, United States v. . Louis-San Francisco Ry., 464 F. 2d 301, 309 th Cir. 1972), petition for cert. filed, 41 U.S.L.W. 89 (U.S. Nov. 10, 1972) (No. 720715).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-1297

United States of America,

Appellant,

v.

The Chesapeake and Ohio Railway Company, a corporation; Locals 268 and 1130 of the Brotherhood of Railroad Trainmen, Locals 362 and 1796 of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees,

Appellees.

NO. 72-1298

United States of America,

Appellee,

v.

Locals 268 and 1130 of the Brotherhood of Railroad Trainmen,

Appellant.

(Granted: January 12, 1973)

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NEWPORT NEWS.

Upon motion of the Locals 268 and 1130 of the Brotherhood of Railroad Trainmen, by counsel, and for cause shown,

IT IS ORDERED THAT the mandate in the above-entitled cases are stayed pending application in the Supreme Court of the United States for a writ of certiorari in this Court, provided the application is filed within the time permitted by law.

/s/ William K. Slate, III
Clerk

Granted: January 12, 1973